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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MAXUS METROPOLITAN, LLC,)
)
Plaintiff,) No. 20-cv-00095-FJG
vs.)
)
TRAVELERS PROPERTY CASUALTY) August 1, 2023
COMPANY OF AMERICA,)
Defendant.)

.....
TRANSCRIPT OF JURY TRIAL - VOLUME 6 OF 8
BEFORE THE HONORABLE FERNANDO J. GAITAN, JR.
UNITED STATES DISTRICT COURT JUDGE

Proceedings recorded by electronic stenography
Transcript produced by computer

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1 TUESDAY, AUGUST 1, 2023

2 (The following proceedings were had in the presence of the
3 jury:)

4 STEPHEN BRYAN, previously being sworn, resumed the stand:

5 DIRECT EXAMINATION (continued) BY MR. ELY:

6 Q Mr. Bryan, I believe when we left off yesterday in terms
7 of the time period of the claim, we had been through the June
8 2nd, 13th, and 14th time period, June 14th, the day of the
9 tenant eviction. I think when I left off yesterday, I had
10 asked you a question with regard to Mr. Spicer's late July,
11 August report to Travelers. I believe my question to you was
12 can you explain why that report was not provided to Maxus at
13 that time?

14 A It wasn't complete. We wanted to make sure that we were
15 as thorough as possible. As Mr. Spicer stated yesterday, he
16 recommended to us that he didn't feel testing was necessary
17 because of his initial site inspection. He didn't see it. He
18 didn't smell it. We had a report from FBS that had testing
19 included; so we felt it was necessary for Spicer to perform
20 testing and to analyze those results.

21 Q So -- and you've heard -- we've heard the testimony of
22 Eugenia Mirica from EMSL and also Denise Weidler from
23 MicroVision, two lab technicians who performed reports for
24 FBS. Do you remember that testimony?

25 A Yes.

1 Q And as you heard that testimony, at the time Chris
2 Spicer issued his report to Travelers on August the 2nd, was
3 Travelers aware that those two lab reports had been issued,
4 one from EMSL and MicroVision -- another from MicroVision?

5 A No. At that time we had only received the FBS report,
6 which included the findings of Carlson, the test results that
7 was provided to them. We were not aware that FBS had also
8 took additional testing in May, and they received test results
9 in mid June from EMSL and MicroVision. EMSL, we eventually
10 got those results on November 14th; and MicroVision, those
11 results were never provided to us. We received those results
12 eventually in litigation.

13 MR. ELY: Let's pull up Defendant's Exhibit 17,
14 please. Go to the third paragraph, if you would, please.

15 Q (BY MR. ELY) Now, Mr. Bryan, you've seen a copy of this
16 letter, correct? Again, this is a communication going back
17 and forth between myself and Mr. Abrams during this period of
18 time. You've seen this letter before; have you not?

19 A Yes.

20 Q And does this -- well, with respect to this, can you
21 tell from this letter how Travelers learned that additional
22 sampling had been done by FBS in May -- late May?

23 A Yes. There was an examination under oath taken of the
24 Bomasada representative Stuart Fred sometime in August. And
25 during that deposition, he revealed that additional testing

1 was done by FBS.

2 Q So Travelers learned of the additional -- the additional
3 sampling done by FBS from Bomasada?

4 A Correct. We learned from Bomasada through the
5 examination under an oath. We never found that out from FBS
6 or Maxus.

7 Q And this letter was a request to Maxus to provide
8 information relating to that sampling, correct?

9 A Yeah. This is the first of several letters requesting
10 that additional testing results.

11 Q Okay. I won't go through each of the letters. But
12 between -- you mentioned November the 13th of 2019. Is it
13 your testimony that between September 12th of 2019 and
14 November the 13th of 2019, Travelers made multiple requests
15 for the information related to the FBS May 30 testing?

16 A Yes.

17 Q Okay.

18 MR. ELY: Can we pull up Plaintiff's Exhibit 11,
19 please. So please go to page 8. I don't believe that's the
20 right one.

21 Q (BY MR. ELY) So on November the 13th, do you have a
22 recollection of when -- or what information was provided to
23 Travelers with regard to this second round of sampling?

24 A Yeah. It was a supplemental report from FBS summarizing
25 the MicroVision -- the EMSL testing results.

1 Q Okay. And the EMSL report was provided with that,
2 correct?

3 A Correct.

4 Q And do you recall the date of the EMSL report?

5 A I believe it was June 14th or June 21st.

6 Q Okay.

7 A You know, one, EMSL and MicroVision were both received
8 in June; so one was received on June 14th, I believe, and one
9 was received around June 21st.

10 Q Did Travelers receive any explanation on November the
11 13th as to why that EMSL report had not been forwarded for
12 nearly five months?

13 A No.

14 Q And we talked -- you heard the testimony of Mr. Spicer
15 yesterday that Mr. Spicer came out on June the 13th to make
16 his initial walk-through. He was asked to go back out to do
17 additional sampling. He did so on September the 30th of 2019.

18 Prior to his visit to the site on September the
19 13th, 2019, had Travelers been provided either the EMSL or the
20 MicroVision sampling reports?

21 A No. And as he testified yesterday, he said that any
22 additional testing results would have been beneficial in his
23 investigation.

24 Q Well, from Travelers' standpoint, would that have been
25 important to you in the claim to ever see those results?

1 A Sure. It was relevant to the damages that were being
2 claimed by Maxus. So, you know, those test results
3 specifically spoke to the additional damages in phases 1
4 through 4 being claimed by Maxus.

5 Q Do you recall in that November the 13th report from
6 Mr. Irmiter at FBS, was there any mention of a second report
7 from MicroVision?

8 A No.

9 Q At any point during the claim prior to litigation, was
10 Travelers ever told by anyone at Maxus they had an additional
11 report it had received from MicroVision?

12 A No.

13 Q Okay. Now, with respect to -- I want to back up.

14 You heard the testimony of Alex Stehl --

15 A Yes.

16 Q -- from Maxus?

17 And you heard the testimony regarding sampling that
18 was done earlier in the claim back around April 11th and 12th
19 by a company out of Helena, Alabama, called SELC. Do you
20 remember that testimony?

21 A Yes.

22 Q Same questions with respect to the investigation of the
23 soot and char claim. At any point in -- during the pendency
24 of the claim, did Maxus advise Travelers that it had retained
25 another testing company, particularly SELC, to come out and

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1 conduct sampling on April 11th and 12th of 2019?

2 A No. First notification that we ever received in regards
3 to the soot and char was on May 1st from David Johnson
4 indicating there could be an issue. Then a letter from
5 counsel stating that they had retained an IH, and eventually
6 we were informed that FBS was out and taking samples.

7 That was the first indication that we had that
8 anyone ever was out on site to take samples.

9 Q Okay.

10 MR. ELY: Can we pull up Plaintiff's Exhibit 369,
11 please. Next page, please.

12 Q (BY MR. ELY) Do you recall this email from me to
13 Mr. Abrams? You might not have seen the email, but do you
14 remember the events?

15 A Yeah. I don't recall the email, but I know this is when
16 we provided the Spicer -- finalized Spicer report to Maxus.

17 Q So December the 16th of 2019, the final Spicer report is
18 provided to Maxus, correct?

19 A Yes.

20 Q And at the time that report was issued, Travelers
21 didn't -- was not aware of the sampling performed by SELC in
22 April of 2019 or the test results from the MicroVision report
23 from the sampling FBS had done May 30th?

24 A No.

25 Q Okay.

1 MR. ELY: Can you pull up Defendant's Exhibit 14,
2 please. Highlight the fourth paragraph, please.

3 Q (BY MR. ELY) Now, Defendant's Exhibit 14 is the May 1,
4 2019, letter from David Johnson, correct?

5 A Yes.

6 Q Do you remember that letter?

7 A Yes.

8 Q Okay. We are making you aware of this information so
9 that you can take immediate steps to engage your own appraiser
10 and experts to inspect and evaluate the damages to the
11 remaining buildings. We will, of course, immediately copy you
12 with any valuations and expert reports we obtain, but we want
13 to strongly request that you not wait until then to engage
14 your experts to start your own investigation into these
15 damages, as the window of opportunity will close quickly when
16 construction and restoration move immediately back into full
17 gear.

18 Based on the information you have now with regard to
19 SELC and the MicroVision report, did Maxus follow through --
20 in your opinion follow through with its promise to provide
21 Travelers with all of the information relating to sampling and
22 testing it was doing at the Metropolitan?

23 A No. And as Mr. Spicer stated yesterday, any sampling
24 testing results that would have been done would have helped
25 assist in his assessment, and it could have possibly, you

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1 know, sped up his final determination.

2 Q From a claims perspective, Mr. Bryan, is it important
3 for you to get all of the information from your insureds?

4 A Yes.

5 Q And would this information have been important in part
6 of Travelers' adjustment of the claim, of the soot and char
7 claim?

8 A Yes.

9 Q And what would Travelers have done with the information?
10 Would it have provided it to its expert?

11 A Yes. We would have provided it to our industrial
12 hygienist for his expert evaluation of it.

13 Q Okay. And in making the decision on the soot and char
14 claim, did Travelers rely on Mr. Spicer's expert opinion in
15 doing so?

16 A Yes.

17 Q And shortly after the December 16th email, do you recall
18 that litigation was initiated in this case?

19 A Yeah. We were -- litigation was filed on December 19th.

20 Q Okay. And still the SELC information, the identity of
21 SELC had not been disclosed, much less the samples, correct?

22 A Correct.

23 Q And nor had the identity of MicroVision or its lab
24 report been disclosed?

25 A Correct.

1 Q So I want to move past the litigation that started in
2 December of 2019 and shift gears into -- quickly into January
3 20th of 2020. Travelers made a supplemental payment, I
4 believe, on January 20th, 2020; is that correct?

5 A Yes. It was roughly \$1.8 million.

6 MR. ELY: Can we go to Defendant's 31, please, and
7 hit the second tab, the spreadsheet. Hit the payments tab at
8 the bottom, please.

9 Q (BY MR. ELY) So, Mr. Bryan, tell me what I'm looking at
10 here.

11 A This is a tab within our statement of loss that
12 summarizes all the payments made to date on this claim.

13 Q Okay. So can you point to the line --

14 MR. ELY: Go up a little bit, Chris, please.

15 Q (BY MR. ELY) Can you point to the line that represents
16 the supplemental payment made on phases 5 and 6 in January of
17 2020?

18 A It would be this one straight across.

19 Q Okay. So payment of \$1,879,385.45 is made on, I
20 believe, January 20th, 2020?

21 A Yes.

22 Q This is after the litigation had started, correct?

23 A Correct.

24 Q Did -- is it a fair statement to say that you and
25 Mr. Bynum continued to adjust this loss throughout litigation?

1 A Yes.

2 Q So this payment was made on January 20th of 2020.

3 With respect to phase 5, can you tell us what
4 specific supplemental damage payment was being made for phase
5 5? Not the amount, but what was being paid for?

6 A There is additional -- it was the additional subfloor
7 replacement and additional ductwork replacement.

8 Q Okay. So why was the ductwork being replaced?

9 A Due to all the subfloor having being replaced, we had to
10 manipulate that to get to the subfloor.

11 Q So on January 20th of 2020, Travelers paid for
12 replacement of the entire subfloor in the phase 5 building,
13 correct?

14 A Yes.

15 Q And additional HVAC removal in order to get that work
16 done?

17 A Yes.

18 Q And did Travelers make a supplemental payment yet again
19 in July of 2020?

20 A Yes.

21 Q And can you point to the line of that, please?

22 A (Witness complied.)

23 Q So do you have a recollection of what that cost was for,
24 that \$138,399.40 was for?

25 A Yeah. Maxus had come back and said to replace all the
847

1 subfloor, they had to manipulate all the fire suppression
2 lines as well.

3 Q So this is -- these are additional costs associated with
4 the complete subfloor removal?

5 A Correct.

6 Q So Travelers paid for the entire subfloor to be removed,
7 HVAC to be removed so it could be done, and sprinkler removal
8 and reset so that work could be done, correct?

9 A Correct.

10 Q And at the time Travelers made these payments on
11 January -- in January of 2020 and, again, in July of 2020
12 after litigation had started, was Travelers aware of the April
13 10th sprinkler line rupture that was referenced in Mr. Stehl's
14 testimony?

15 A No.

16 Q Had Maxus provided any notice whatsoever to Travelers
17 that that sprinkler line rupture had taken place in the phase
18 5 building April 10th, 2019?

19 A No.

20 Q And just as -- to refresh, the policy expired on
21 September the 30th of 2018, correct?

22 A Correct.

23 Q So Travelers made those payments not knowing there had
24 been a -- there had been a sprinkler rupture in phase 5 that
25 had put water on all four floors?

1 A Correct.

2 Q Would that have made a difference in the claim
3 evaluation of this additional water damage?

4 A Sure it would have. I recall when Greg, the general
5 adjustor, went out with EDT in June of '19 or July of '19,
6 that they -- after the additional water damage was claimed,
7 they saw additional water damage. We talked about it. We
8 were surprised that that much additional water damage was
9 manifested itself, you know, six to nine months after the
10 loss.

11 We weren't aware of any other cause that would have
12 caused that. Maybe ACT was out there, evaluated, did moisture
13 mapping. We replaced what they recommended at the time.

14 Based on the additional damage we saw and ultimately
15 some additional reports that we received, we eventually agreed
16 to replace all the subfloor. We had no reason to believe that
17 it was not as a result of the firefighting efforts.

18 Q And in April -- you heard Mr. Irmiter's testimony, April
19 the 24th of 2019, was it Travelers' understanding that the
20 entire subfloor in the phase 5 didn't need to be replaced?

21 A Correct.

22 Q At some point by January of 2020, that, in fact, was the
23 case?

24 A Right. If I remember closely, it was around 3,000
25 square feet that we replaced based on the recommendation of
849

1 ATC.

2 Q Okay.

3 MR. ELY: Can we go to Defendant's Exhibit 14 one
4 more time, please. Go to the last paragraph, please.

5 Q (BY MR. ELY) Can you read that for us? Again, this is
6 from David Johnson's letter of May 1, 2019.

7 A There is also extensive water damage to the flooring in
8 the phase 5 building that we believe will require replacement
9 of most of the flooring in place at the time of the fire.
10 This is a frustrating move backwards for us, but one that
11 cannot be prevented, unfortunately.

12 Q So Travelers' payments in January of 2020 and July of
13 2020 were in direct response to that supplemental water damage
14 claim articulated in the May 1 letter?

15 A Correct.

16 Q And nowhere in that May 1 letter does it mention the
17 sprinkler line rupture that had been discussed earlier in this
18 case?

19 A No. This whole letter is referring to damage directly
20 caused by the fire.

21 Q And at no time did anyone at Maxus ever, first, tell
22 Travelers about the -- prior to the payment, tell Travelers
23 about the sprinkler line rupture and the extent of damage?

24 A No.

25 Q And the incident reports that we saw earlier in the

1 trial, those were never provided to Travelers prior to that
2 payment, were they?

3 A No.

4 Q And the video that we saw was not provided to Travelers
5 prior to that payment?

6 A No.

7 Q Okay. So finally, Mr. Bryan, you recall that in the
8 February, March timeframe of 2020, again, four months after --
9 or three or four months after litigation had started, there
10 was a claim for water damage to the phase 1 through 4 roof.
11 You recall that?

12 A Yes.

13 Q Tell me what Travelers did with respect to the
14 investigation of that water -- that water damage claim from
15 damage to the roof.

16 A We had EDT go out and take a look at the phase 1 through
17 4 building.

18 MR. ELY: Can we pull Defendant's Exhibit 1, page 2,
19 please.

20 Q (BY MR. ELY) So, Mr. Bryan, will you read Section 4A, B,
21 C, and D?

22 A We will not pay for loss or damage caused by or
23 resulting from faulty, inadequate, or defective planning,
24 design -- planning, zoning, development, surveying, siding,
25 design, specifications, workmanship, repair, construction,

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1 renovation, remodeling, grading, or compaction, materials used
2 in repair, construction, renovation, remodeling, grading, or
3 compaction or maintenance.

4 Q And did Mr. Mulder issue an opinion to Travelers in
5 terms of his investigation of that water damage claim?

6 A Yes.

7 Q And what was his opinion?

8 A In summary, if I recall correctly, he identified issues
9 with the installation of the phase 1 through 4 roof. Greatest
10 issue was there was no IsoBoard underneath the TPO membrane
11 that was required by the 2009 codes. Instead that TPO roof
12 was laid directly on the OSB decking.

13 And there was some siding installation issues and
14 some issues with the stucco that required further destructive
15 testing. And I believe that would be -- I'm sure I didn't
16 capture everything, but those were the major --

17 Q Did Travelers rely on Mr. Mulder's opinion in making its
18 determination of coverage with regard to the water damage
19 claims, phase 1 through 4?

20 A Yes.

21 MR. ELY: Pass the witness, Your Honor.

22 CROSS-EXAMINATION BY MR. ABRAMS:

23 Q Good morning.

24 A Morning.

25 Q First, let's clear something up that was talked about or
852

1 mentioned earlier about Maxus not being the original insured,
2 but an additional insured. Do you remember talking about
3 that?

4 A Yes.

5 Q Just so we're clear, that doesn't mean that Maxus is any
6 kind of lesser insured, correct?

7 A No. There's some additional loss payee language in the
8 policy that says they have coverage under the policy up to
9 their financial interests.

10 Q Okay. So we don't get any less coverage than the
11 original insured under the terms of the --

12 A No. The same policy provisions, conditions apply.

13 Q All right. Let's talk about time. Once again,
14 Travelers had received notice of the fire the day it happened,
15 September 27th, 2018, correct?

16 A Yes, sir.

17 Q All right. And by November 20th, 2018, almost two
18 months, Travelers had neither accepted coverage or made any
19 payments on the claim, correct?

20 A Correct.

21 Q And it wasn't until December 2018 that -- I'm sorry. It
22 wasn't until November 29, 2018, nine days after the Alabama
23 Department of Insurance complaint, that Travelers finally
24 accepted coverage, correct?

25 A Yes. Based on information received November 7th from
853

1 the agent, we had already started the process of having the
2 policy reformed.

3 Q All right. Let me ask you about that. This is this
4 protected safeguards issue, right?

5 A Correct.

6 Q Okay. And what you're saying is, if I've got this
7 right, is that there was an error in the policy, correct? The
8 policy didn't reflect what the policy -- what actually should
9 be, correct?

10 A I do not know how underwriting determined if it was an
11 error, if that should have been there or not. They just --
12 they took that information from the agent and agreed to make a
13 reformation on the policy.

14 Q What you said yesterday was that -- first of all,
15 underwriting is Travelers, right?

16 A Correct.

17 Q Okay. It's not -- it's just a different department that
18 you work in?

19 A Yeah. I don't -- but I have no -- I have no idea what
20 their inner workings are, what they do. They don't keep me in
21 the loop on all that.

22 Q Right. I just want to make it clear because when we
23 talk about underwriting, underwriting is part of Travelers?

24 A Correct.

25 Q Okay. And what you said yesterday was that underwriting
854

1 received a letter from the broker saying policy is wrong; you
2 need to fix the policy, correct?

3 A I think he pointed out a letter that was included
4 prior -- in a prior renewal that had some different language.

5 Q Okay. But you weren't waiting on anything from Maxus,
6 right? This was -- this was a letter from the broker that
7 said this is what should be in the policy for protected
8 safeguards, correct?

9 Well, and to be fair, you're really not part of the
10 underwriting department, so you really don't know, do you?

11 A Well, we were waiting on documentation from the insured.
12 We were waiting on documentation in regards to the security
13 guard service and the sale of the property to Maxus.

14 Q Okay. But you didn't need -- what we determined, what
15 you said yesterday was, is under the protective safeguards
16 endorsement, you didn't need both, correct? You needed one or
17 the other?

18 A Correct. Yeah, after May -- after receiving the
19 information on November 7th, that's what was determined.

20 Q Okay. And it took the broker telling your underwriting
21 department, hey, you got the policy wrong, correct? That's
22 your understanding?

23 A I don't know if he stated it was wrong. He just
24 indicated that there was a letter out there.

25 Q That the policy should have been different?

1 A That stated, yes, that there was an either/or on the two
2 protected safeguards indicated for fire.

3 Q Okay. Travelers agreed to and paid Bomasada to hire ATC
4 to do some combustion byproduct testing on phase 5 in the
5 spring of 2019, correct?

6 A Well, they were out there in December of '18.

7 Q Okay. But at some point, Travelers actually agreed and
8 paid to remediate combustion byproducts on phase 5, correct?

9 A Yes. We paid -- based on the ATC report, we paid to
10 repair some fire -- damage from fire and ultimately remediate
11 some of the soot and char found in phase 5.

12 Q Okay. So Travelers recognized, but at least with
13 respect to phase 5, under this policy that soot and char
14 remediation was covered under the policy, correct? It
15 wouldn't have paid for it on phase 5 if they didn't think it
16 was covered, right?

17 A Right. Well, we don't -- we don't pay for soot and char
18 remediation if there's no additional damage. So there was
19 damage caused to phase 5. We paid to fix that, which was the
20 exterior, replace some windows. It was open to it. So, yes,
21 ultimately we determined that part of that process was to
22 remediate some of the soot and char that entered phase 5.

23 Q And Travelers paid for it?

24 A Correct.

25 Q It recognized -- and you -- Travelers wouldn't have paid
856

1 for soot and char remediation in phase 5 if it didn't think it
2 was owed under the policy, fair?

3 A Correct.

4 Q Okay.

5 MR. ABRAMS: Melissa, let's go down the outline.

6 Q (BY MR. ABRAMS) And counsel had just showed this to you
7 before. If you look at Exhibit 301.

8 While Melissa is getting that up, I know you've seen
9 this before. So this is not going to be news but just to
10 orient ourselves.

11 May 1, 2019, you received a letter -- actually
12 Mr. Bynum receives a letter from Mr. Johnson saying, Hey, we
13 believe we've got a soot and char problem, correct?

14 A Correct.

15 Q And by the way, so you are Mr. Bynum's -- or were
16 Mr. Bynum's supervisor?

17 A Yes.

18 Q Are you still his supervisor?

19 A Yes.

20 Q Okay. So you receive that letter May 1, 2019, and then
21 on June 7, 2019, you receive the FBS report, correct?

22 A Correct.

23 Q All right. And, again, I say "you," Travelers. It
24 really came to Mr. Bynum, correct?

25 A Yes, sir.

1 Q Again, on June 11, 2019, Maxus wrote to Travelers
2 requesting input for the remediation issues that were outlined
3 in the FBS report, correct?

4 A It sounds right. There was a lot of communications
5 going back and forth at that time.

6 Q Okay.

7 MR. ABRAMS: So are you able to pull up Exhibit 311?

8 Q (BY MR. ABRAMS) Maybe we can do it without it because I
9 think you're familiar with these documents. If you need to
10 see it, we'll do it. We're trying to get it put up.

11 The next day, June 12th, Mr. Ely writes a letter,
12 June 12th, 2019. And as part of that letter, we've read this
13 sentence a couple of times. It says, Travelers has not
14 undertaken and will not undertake any technical, safety, or
15 other review of the report or opinions of Mr. Irmiter.

16 You remember that?

17 A Yes.

18 Q Okay. By the way, isn't that exactly what Travelers has
19 done here throughout this trial?

20 A Well, I can't speak for Mr. Ely, but I know that we
21 received that FBS report on June 7th of '19. And if we pull
22 that up, what, I think it was in excess of 70, 80 something
23 pages. So in order for us to review it, we're not going to be
24 able to review it and fully -- you know, review all the
25 information in a week.

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1 So, you know, we're always going to request more
2 time.

3 Q No. I understand that. I understand that, Mr. Bryan,
4 but that's not what the letter from Travelers says. The
5 letter says Travelers has not undertaken and will not
6 undertake any technical, safety, or other review of the report
7 or opinions of Mr. Irmiter, right?

8 A Well, yeah. Travelers -- we had retained an expert, so
9 we're not going to comment on technical stuff. We're not
10 going to -- we never comment on safety.

11 Q No, no. That's -- I'm going to get to that. That's the
12 next question.

13 What I'm getting at is Travelers says that it has
14 not undertaken and will not undertake any technical, safety,
15 or other review of the report or opinions of Mr. Irmiter. But
16 isn't that what you've done in this trial? Isn't what you've
17 done is to review and undertake the technical, safety, or
18 other review of the reports of Mr. Irmiter? Fair?

19 A Travelers has not. Chris Spicer has on behalf of
20 Travelers, yes.

21 Q Is that what you're -- you think that's what you're
22 saying in this letter, is Travelers is not going to do it, but
23 Travelers could hire someone else to do it? Is that what was
24 meant by that letter?

25 A I didn't write that letter so I can't tell you. I can't

1 speculate as to what was meant in that letter.

2 Q Well, you speculated about a bunch of letters that you
3 didn't write before. This is -- but you would agree with me
4 that this is on behalf of Travelers, correct? This is what
5 it's telling its insured?

6 A Yes.

7 Q Okay. And, sir, are you saying that when it says
8 Travelers will not undertake any technical, safety, or other
9 review of the report or opinions of Mr. Irmiter, that you were
10 saying, well, it's Travelers internally won't do it, but we
11 may hire someone else to do it? Is that what was meant by
12 this? Is that --

13 A Again, I didn't write it.

14 Q Okay. So you don't know? DO you think this was wrong?

15 A No.

16 Q You think this is correct?

17 A (Witness nodded head.)

18 Q Okay. Would you agree with me that the experts that
19 Travelers has hired and who have testified in this courtroom
20 this week and last week were under -- did undertake technical,
21 safety, and other review of the reports or opinions of
22 Mr. Irmiter? Will you agree with me on that?

23 A That our experts did?

24 Q Right. On your behalf.

25 A Yes.

1 Q Okay. All right. Let's move on.

2 We know -- we heard from Mr. Spicer yesterday. And
3 he did his investigation, and you received by August 2nd
4 Mr. Spicer's report, correct?

5 A Correct.

6 Q And when I say "you," it came to Mr. Bynum, but he
7 shared it with you?

8 A I mean, if you want to get official, there was a lot of
9 communication going through Mr. Ely, not Mr. Bynum. So you're
10 right, it was either to Mr. Bynum or to Mr. Ely.

11 Q Okay. Because it's addressed to Mr. Bynum, but that's
12 your -- he's your report?

13 A Correct.

14 Q Okay. So August 2nd, Travelers knew, correct, that its
15 expert disagreed with the findings of the FBS report, correct?

16 A Yes.

17 Q All right. And you said something, and I wrote it down.
18 You said that the report was preliminary, correct?

19 A Yes.

20 Q The report does not say it's preliminary, correct?

21 A Correct.

22 Q In fact, I asked Mr. Spicer, Was the August 2nd report
23 preliminary yesterday. And he said no, correct?

24 A Correct.

25 Q Okay. Let's see if we can do this. Mr. Bryan, if you

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1 need the documents in front of you, please let me know.

2 But you're aware that between when people were moved
3 out of the Metropolitan in June of 2019, Maxus continued to
4 write letters to Travelers requesting information regarding
5 what its experts had -- the conclusions they had come to,
6 correct?

7 A Correct.

8 Q And, in fact, there was a letter that we saw before,
9 Plaintiff's Exhibit 339, on September 18th asking for
10 Travelers' position on the soot and char remediation? Do you
11 remember that?

12 A That's a letter from you?

13 Q Well, let's get it out. Yes.

14 A There's a lot of them.

15 Q I know. I'm taxing your memory while we try to get the
16 screen working. Right? So I'm correct, this is the September
17 18th, 2019, letter asking for a position?

18 A Yes, sir.

19 Q And, again, on October 2nd, you remember there was
20 another letter asking for Travelers' position on soot and
21 char?

22 A Yeah. I remember there was multiple letters going back
23 and forth, you requesting our position and Mr. Ely responding
24 saying we were going to have our expert inspect.

25 Q Okay. And then on -- and you understand that on October
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1 9, 2019, that Maxus hired a contractor to remediate the -- and
2 sign a contract with the contractor to remediate phases 1
3 through 4?

4 A Yes. Yeah, that would be BCCM.

5 Q Okay. And, again, it wasn't until December 16, 2019,
6 that Travelers shares the August 2nd report by Mr. Spicer,
7 correct?

8 A Correct. Once he got all his testing done and --

9 Q But what -- the report that was shared was the August
10 2nd report and a second report, correct? It was both?

11 A I believe he incorporated his initial August 2nd report
12 into the report that evaluated the testing completed on
13 September 30th.

14 Q But you sent us both reports. You sent us August 2nd
15 and the later report, correct?

16 A From what I remember, it was one whole report that
17 Spicer provided.

18 Q Okay.

19 MR. ABRAMS: Okay. Can we pull that up?

20 Your Honor, we're having a problem getting things
21 pulled out.

22 Your Honor, I apologize. It's going to take ten
23 minutes. We're going to have to switch laptops.

24 THE COURT: Don't you have a hard copy?

25 MR. ABRAMS: Yeah. We can do that.

1 All right. We're going to find it for you. We'll
2 come back to it. I don't want to waste too much time.

3 Q (BY MR. ABRAMS) I'll show you the email. You don't
4 remember whether -- based on the August 2nd report and his
5 second report or it was just one report together?

6 A Yeah. I just recall that there was a report, and then
7 the testing was after, where he commented on the testing.

8 Q All right. We'll refresh your recollection in a minute.
9 Plaintiff's Exhibit 369.

10 Mr. Bryan, does it refresh your recollection that
11 what was sent to Maxus was Mr. Spicer's August 2nd, 2019,
12 report and his December 11 report?

13 A Yeah. It has -- it has a link containing two
14 attachments. So --

15 Q So he sent both, right?

16 A Correct. He sent two attachments.

17 Q Right. The August 2nd report and the December 11th
18 report, correct?

19 A Well, it says December 11th assessment of combustion
20 product impact. So as I said, one was the initial report, and
21 the other was the additional information in regards to the
22 testing that he performed.

23 Q I understand your point. There were two different
24 reports. They sent both reports, the August 2nd report and
25 the December 11th report. Are you saying the December 11th is
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1 not a report; it's an assessment?

2 A You're going to have to clarify that with Spicer. I'm
3 just telling you when we reviewed -- when we got this, he
4 said, Here you go. Here's my report, and here's also the
5 assessment of the testing that was completed.

6 Q Okay. I'm trying -- I'm really just asking a simple
7 question.

8 On December 16, 2019, when we received the
9 information from Mr. Spicer, it was two different things,
10 right? It was, one, Mr. Spicer's August 2nd, 2019, report;
11 and number two, his December 11th, 2019, report, fair?

12 A Yeah, you're correct. It appears that there are two
13 items here. It's saying there's two items. How it was
14 captured in the Dropbox links, I have no idea; but, yes, it's
15 broken out by No. 1 and No. 2.

16 Q Okay. And so when this was sent December 16, 2019, this
17 was after Maxus had already started tearing out and replacing,
18 remediating 1 through 4. We saw the pictures of that. You
19 saw all the garbage bags and so on, correct?

20 A Yes.

21 Q All right. Do you have any idea why Mr. Bynum didn't
22 send the August 2nd report when it was received?

23 A As Mr. Spicer testified yesterday, he submitted that
24 report. We had a conversation with him. We determined that
25 additional testing would be done.

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1 Until that additional testing was done, we felt our
2 review wasn't complete, it wasn't thorough. We were going to
3 wait until everything was done to send the report.

4 Q Well, that's what Travelers thought, right? But
5 Mr. Spicer said it wasn't a preliminary report, correct?

6 A He did say it did not say preliminary on the report.

7 Q And -- but do you have any idea why Mr. Bynum didn't
8 pick up the phone and call Maxus and say, Our expert disagrees
9 with yours, hold off. We're going to do additional testing.

10 But do you have any idea why Mr. Bynum didn't pick
11 up the phone and call my client?

12 A Again, we discussed internally. We felt the report
13 wasn't complete without the results of the testing.

14 Q But was it -- would it have done any harm to Travelers
15 or anyone to -- for Mr. Bynum to pick up the phone and say,
16 Listen, we got this report, this August 2nd, 2019, report,
17 from Mr. Spicer. We have some disagreements about the
18 condition of the property. It's important for you to know
19 we're asking for it?

20 What would the harm have been in doing that?

21 A If the test results would have came back totally
22 different and we would have said we weren't in agreement what
23 it was doing -- so we didn't want to jump to a conclusion that
24 was preliminary. We wanted to make sure that we had all the
25 information available before we shared any results.

1 Q But what would the harm have been for Mr. Bynum simply
2 to say, We got a report from Mr. Spicer, he has a disagreement
3 with your experts?

4 What would the harm have been in doing that?

5 A Travelers' position is we do not share incomplete
6 reports.

7 Q Okay. But this wasn't an incomplete report, was it?

8 A Based on our conversation with Mr. Spicer, there was
9 testing that was available to be completed; therefore, we had
10 to go out, take tests and get those test results.

11 Q So are you saying, Mr. Bryan, that it is Travelers'
12 policy that when an insured is asking about an expert's
13 opinion before it moves people out, before it signs a contract
14 with a -- with a remediator, before it starts ripping up the
15 building, your policy is don't tell the insureds that the
16 expert's opinion is that he has a differing opinion than the
17 insured's opinion? Is that your testimony?

18 A This is the first situation of this nature that I've
19 ever encountered; so I can't comment what -- I've never
20 encountered this --

21 Q That's fine.

22 A -- prior.

23 Q I appreciate that. So, Mr. Bryan, if you had to do it
24 again, would you have told Mr. Bynum to say, Listen, pick up
25 the phone, call your insured and say we've got a report from

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1 our expert that disagrees with yours. You need to know that.

2 Do you think you should have done that?

3 A No. We determined that there was testing still to be
4 done and reviewed, and we waited until all that was completed.

5 Q All right. I'll move on.

6 All right. You were asked about some policy
7 provisions on the Travelers' policy. And this is a policy
8 that Travelers wrote, correct?

9 A Yes.

10 Q The insured doesn't write the policy. It comes from
11 Travelers.

12 A I don't know if Travelers writes the policy yet. I
13 don't -- I don't know who writes the policies. These forms
14 are similar across all insurance companies. So Travelers
15 provided the policy.

16 Q Right. They may have paid someone to write it for them,
17 right?

18 A I don't get -- I don't know who writes it.

19 Q Okay. But you know that the insured doesn't write it,
20 correct?

21 A Correct.

22 Q All right. You were asked about direct physical loss,
23 the policy provision that says direct physical loss of or
24 damage to covered property, correct?

25 A Correct.

1 Q All right. And that's what the policy covers, right,
2 direct physical loss of or damage to covered property,
3 correct?

4 A Correct.

5 Q And there's no definition in the policy of the term
6 "direct physical loss," is there?

7 A I'd have to look at the policy. But from my
8 recollection, no, there's -- I don't believe that's in the
9 definitions defining direct physical damage. We can agree on
10 that.

11 Q Okay. I would show you the policy, but --

12 A No. That's fine. We can --

13 Q Okay. The policy doesn't say the property must be
14 uninhabitable to suffer direct physical loss, correct?

15 A Correct.

16 Q And the policy doesn't state that the damage to the
17 property must render it unhealthy to be considered direct
18 physical loss, correct?

19 A Correct.

20 Q All right. Let's -- we know, just to reorient
21 ourselves, that Travelers agreed that it would pay to rebuild
22 phases 5 and 6 of the Metropolitan to get to -- get them to
23 their prefire condition stage of completion, correct?

24 A Correct.

25 Q All right.

1 MR. ABRAMS: Can we put side by side slide 128 that
2 we used for Irmiter with the Travelers' payments?

3 Q (BY MR. ABRAMS) All right. Mr. Bryan, what we're
4 looking at here is the column -- the middle column is the
5 amounts that Maxus claims that it paid to rebuild 1 through 4,
6 5 and 6, correct?

7 A Correct.

8 Q Okay. And the column on the right is what Travelers has
9 represented it has paid to Maxus to rebuild 1 through 4, 5,
10 and 6, correct?

11 A Correct.

12 Q So let's take these one by one. On 6, Maxus states that
13 it cost them \$6,218,703.24 to rebuild phase 6 from -- rebuild
14 phase 6, correct?

15 A Correct.

16 Q And it's true that Travelers has paid \$5,052,463.41,
17 correct?

18 A Correct.

19 Q All right. What hasn't Travelers paid for?

20 A I don't --

21 Q Well, we went through all of the pay apps. Remember,
22 Mr. Irmiter was here. We went through every single pay app,
23 every single check, every single bill adding up to the \$6.2
24 million.

25 What is Travelers not paying for on phase 6?

1 A Okay. So if you recall after my last deposition, right
2 before that deposition, you got -- Maxus had provided
3 thousands of documents that supported the amount incurred.

4 After that deposition, I personally went through
5 those thousands of pages of invoices, of incurred invoices for
6 phase 6, 6.2 million.

7 Provided a detailed spreadsheet to -- I believe it
8 was provided to you and Maxus. I'm not sure if it was
9 provided -- something that we put together that I verified
10 that based on those invoices, only \$4.688 million roughly were
11 actually related to phase 6, and that had documentation that
12 could support the incurred costs.

13 Q I don't have it. Sitting here today, though, we're in a
14 trial. You know what we're claiming. We're claiming \$6.2
15 million. Can you tell us what -- and you've only paid \$5
16 million. And you're the only witness from Travelers,
17 Mr. Bryan. You're the only person who can testify about this.
18 We went through and went line by line of what we paid.

19 Can you tell us which of that -- of that \$6.2
20 million Travelers is not paying?

21 A I can tell you based on the documentation we received,
22 based on the originals back in February of '19, the Howarth
23 estimate received in July of '19, the additional information
24 received from the principals' meeting of November 14th of '19,
25 the additional documentation received after that, we

1 calculated \$5 million to repair phase 6 at the time of the
2 loss.

3 We received document -- I went through all these
4 invoices that were incurred for the rebuild, determined that
5 we could only verify \$4.688 million were directly related to
6 the fire rebuild of phase 6 and that we could document that
7 those items were there at the time of the loss.

8 Q And did you write a letter to your insured saying, No,
9 we're disagreeing with you on this million two?

10 A It was in litigation at that time, so there's no
11 requirements that we communicate during litigation. But I --
12 me personally, all communication was going between yourself
13 and Travelers' lawyers. So I did not personally send a
14 communication.

15 Q All right. Let's try to figure it out this way. I
16 think what you said is, is Travelers calculated its \$5 million
17 based on Xactimate, correct?

18 A And based on the documentation we received from Bomasada
19 to support the level of completion at the time of the fire.

20 Q Xactimate is a resource that you use to estimate how
21 much it will cost to rebuild something, correct?

22 A Yes.

23 Q All right. But it's an estimate, right?

24 A Yes. It's an estimate.

25 Q And there's nowhere in the policy does it mention that

1 the parties have to follow Xactimate, correct?

2 A No.

3 Q Okay. Wouldn't you agree with me that the best
4 indication of the true cost to rebuild is what was actually
5 paid to rebuild versus what an estimate is to rebuild,
6 correct?

7 A I would agree.

8 Q Okay. And I don't want to belabor the point. You can't
9 do it, you can't do it.

10 But sitting here today, can you tell us -- because
11 we went through pay app by pay app, check by check, bill by
12 bill. Can you tell us sitting here today what 1.2 -- well,
13 less than 1.2 million on phase 6 Travelers is not paying and
14 why?

15 A I can't tell you specifically what it was. But like I
16 said, I went through all those invoices, these incurred
17 invoices, and was only able to verify \$4.688 million that we
18 could verify --

19 Q All right.

20 A -- incurred.

21 Q But just to be clear, in preparation for your trial that
22 we knew we were going to be here, you can't, sitting here
23 today, tell us which pay apps you're not paying and which you
24 are paying for phase 6, correct?

25 A Correct, no.

1 Q Okay. Let's go to phase 5.

2 Phase 5, Maxus paid claims -- and is submitting its
3 claim for \$3,647,113.39, correct?

4 A Correct.

5 Q And Travelers has paid -- what it's represented to the
6 court and to us, that it's paid for phase 5 \$1,018,778.81,
7 correct?

8 A Correct.

9 Q And I don't want to belabor the point again because I
10 think the answer is going to be the same. But you can't,
11 sitting here today, tell us which pay applications, which
12 change orders, which contracts Travelers is paying and not
13 paying for phase 5, correct?

14 A No, not specifically. We've reviewed everything, and we
15 feel that our 1.18 accurately reflects the damages directly
16 related to the fire.

17 Q Sitting here today, you can't specifically differentiate
18 for us what you paid and what you didn't pay?

19 A You can bring up my Xactimate, the Xactimate estimate,
20 and it will specifically lay out exactly what we paid for.

21 Q Well, the Xactimate is just an estimate of what you
22 expect the cost would be, right? Right?

23 A Correct.

24 Q Okay. It's not what was actually paid, right,
25 Mr. Bryan?

1 A I don't understand that question. It does reflect what
2 we actually paid.

3 Q Oh, I'm sorry. What Travelers paid, but not what the
4 actual costs were?

5 A It does not -- no, it does not reflect what was actually
6 incurred, being claimed.

7 Q Okay. Well, I think -- well, 1 through 4 may be easier,
8 right?

9 A Yes.

10 Q Okay. Maxus paid \$1,653,539.60 to rebuild 1 through 4
11 without remediation.

12 The \$37,101.30, do you know what that's for that
13 Travelers paid?

14 A We replaced, I believe, five windows. We paid to clean
15 and paint one side of phase 3.

16 Q Okay. So that's easier. You're not paying for any of
17 the rest that's claimed that Mr. Irmiter went through?

18 A Yes. It's a difference in scope, yes, sir.

19 Q That one is a little easier.

20 And for remediation, Maxus -- I'm sorry. Aside from
21 phase 5, which Travelers paid for, Travelers is not paying for
22 any remediation of 1 through 4, correct?

23 A Correct.

24 Q Okay. One little, small thing. We've heard about
25 sprinkler breaks and so on.

1 You heard the testimony the sprinkler break was
2 cleaned up, correct, shortly afterwards?

3 A I did, yes.

4 Q You weren't present at the time of the sprinkler break,
5 correct?

6 A No, sir.

7 Q In fact, you didn't know about it, right?

8 A No, sir.

9 Q But -- okay. And you -- well, let's just -- we'll leave
10 it at that.

11 MR. ABRAMS: Pass the witness.

12 MR. ELY: Brief redirect.

13 Can we pull up Plaintiff's Exhibit 310.

14 REDIRECT EXAMINATION BY MR. ELY:

15 Q Mr. Bryan, Mr. Abrams was asking you questions about the
16 technical review language in my June 12th, 2019, letter. The
17 June 12th, 2019, letter was written in response to a June
18 11th, 2019, letter -- do you remember that -- from
19 Mr. Abrams?

20 A Yes.

21 Q And have you seen this letter before?

22 A Yes, I have.

23 Q Okay. Can you take a look at this letter and tell us
24 what is the specific question being asked by Maxus to
25 Travelers here?

1 A I believe it's imperative that we hear from you
2 immediately if you have any objection or do not see the
3 necessity of proceeding in that manner, and I believe that's
4 in reference to evacuating the tenants.

5 Q So the question being -- you recall the question that
6 was asked to Travelers is -- from Maxus is, Are you -- is it
7 okay if we evacuate our tenants?

8 A Correct.

9 Q And so the language that is in my June 12th letter about
10 technical feasibility and evaluation, was that in response to
11 that specific question and whether Maxus should evict its
12 tenants?

13 A I believe so.

14 Q Okay.

15 MR. ELY: Can we go to Plaintiff's Exhibit 342,
16 please.

17 Q (BY MR. ELY) So this is dated September the 30th of
18 2019, and I believe Mr. Abrams mentioned the October 8th
19 contract with BCCM, which it entered into that contract for
20 remediation of phases 1 through 4, correct?

21 A Correct.

22 Q Is that your recollection?

23 A Yes.

24 Q So on September the 30th of 2019, that was the same date
25 Chris Spicer came to the Metropolitan to sample, correct?

1 A Yes.

2 Q And take a look at that second paragraph.

3 A Pretty much saying we won't have an answer on what our
4 position is on the damages until we get our expert report.

5 Q Okay. So as of September the 30th, 2019, which was a
6 week before the October 8th contract with BCCM, Travelers is
7 advising Maxus that, number one, Mr. Spicer has been out to
8 sample, which Maxus knew already; and secondly, that it
9 wouldn't be able to comment on remediation, the necessity of
10 remediation until it got those results back, correct?

11 A Correct.

12 Q Finally, Mr. Bryan, you mentioned the spreadsheet that
13 you did, I believe, in the 2021 timeframe with regard to phase
14 6?

15 A Yes.

16 Q That was based on the as-built documentation provided by
17 Maxus, correct?

18 A Correct.

19 Q I believe you placed the value of the rebuild as
20 incurred that you could verify was, A, in the building at the
21 time of the loss; therefore, related to the fire at, what, a
22 \$4.6 million number?

23 A Roughly, yes.

24 Q And how much did Travelers pay back in -- how much has
25 Travelers paid on phase 6?

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1 A A little over \$5 million.

2 Q So based on the documentation you reviewed in 2021 that
3 you received from Maxus, the number -- the as-built number
4 actually worked out to be less than what the Travelers'
5 Xactimate number that it paid off of?

6 A Correct.

7 MR. ELY: Thank you.

8 Nothing further, Your Honor.

9 RE CROSS-EXAMINATION BY MR. ABRAMS:

10 Q Just so we've got this correct, Mr. Bryan. This
11 analysis that you did that we don't have in front of us right
12 now was based on Xactimate, correct?

13 A No.

14 Q The -- wait a minute. I'm talking about for phase 6,
15 the rebuild. The basis for what you used was Xactimate, what
16 the -- what the estimate would be for the rebuild, correct?

17 A Correct. But we didn't put what we were able to verify
18 was present at the time of the loss. So it wasn't just
19 Xactimate. We took all the documentation that was provided by
20 Bomasada to verify what we would put in the estimate.

21 Q By the time it was actually built, we've now submitted
22 to you bills, costs, change orders that equal the \$6.2
23 million, correct?

24 A Correct.

25 Q You've seen that? And sitting here today, you can't
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1 tell us of those \$6.2 million, what you haven't paid for, what
2 the difference is, right?

3 A Not specifically, no.

4 Q Okay.

5 MR. ABRAMS: Melissa, can you -- if we could go to
6 Plaintiff's Exhibit 255. This is the insurance policy.

7 Q (BY MR. ABRAMS) Mr. Ely was asking you about faulty
8 workmanship, and I want to read the -- have you read the rest
9 of the provision.

10 MR. ABRAMS: If we could go to page 31 of 82.

11 Q (BY MR. ABRAMS) Because there's an important exception
12 to the faulty workmanship exclusion, correct? By the way,
13 let's define our terms. I'll strike that.

14 What's an exception to an exclusion? Only insurance
15 folks would know this.

16 A I don't know what you mean by "exception to an
17 exclusion." Yeah, there is additional language after this
18 that --

19 Q Okay. Have you never heard the term "an exception to an
20 exclusion"?

21 A No, I've never used that term.

22 Q All right. And it says here that -- so if a covered
23 loss is caused by faulty workmanship, that is covered -- well,
24 read what we have here for this provision. Do you see --

25 A You want me to re-read what I read before or just below?
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1 Q No. The part below.

2 A You'll have to --

3 Q You're right. We've got to move it up a little bit. An
4 excluded cause of loss.

5 A So part of any property on or off the job at the
6 described -- in the declarations. If an excluded cause of
7 loss listed in paragraph 4A through 4D above results in a
8 covered cause of loss, we will pay for the resulting loss or
9 damage caused by that covered cause of loss, but we will not
10 pay for any cost of correcting or making good the fault,
11 inadequacy, or defect itself, including any cost incurred to
12 tear down, tear out, repair, or replace any part of any of the
13 property to correct the fault, inadequacy, or defect, or any
14 resulting loss or damage to the property that has the fault,
15 inadequacy, or defect until the fault, inadequacy, or defect
16 is corrected.

17 Q Okay.

18 MR. ABRAMS: I'll leave it at that. I will not ask
19 you to interpret the policy. Thank you.

20 MR. ELY: Nothing further, Your Honor.

21 THE COURT: Thank you.

22 THE WITNESS: Thank you.

23 STUART BATTERMAN, being duly sworn by the courtroom deputy,
24 testified:

25 DIRECT EXAMINATION BY MR. ELY:

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1 Q Good morning. Can you state your name for the record.

2 A Stuart Batterman.

3 Q Where do you reside?

4 A I live in Michigan.

5 Q What's your current -- are you employed?

6 A Yes, I am.

7 Q Tell us where you're employed and what you do.

8 A Yeah. I'm a professor at the University of Michigan.

9 My home department is the school of public health,
10 environmental health sciences. I have appointments in civil
11 and environmental engineering and also as professor of global
12 public health.

13 Q Okay. And at the University of Michigan, do you also
14 teach?

15 A Yes, I do.

16 Q Tell us generally. You teach undergraduate, you teach
17 graduate level classes; what do you teach?

18 A I teach primarily grad students and also in continuing
19 ed as well.

20 Q Okay. And generally speaking, what are the -- what is
21 the general subject matter of the classes you teach?

22 A Yeah. So I teach a number of courses on environmental
23 impact assessment, indoor air, ambient air quality, pollution
24 and health and research efforts.

25 Q Okay. So if you could, Dr. Batterman, give us a little
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1 bit of your educational background, please.

2 A Sure. I have a Bachelor's of Environmental Science from
3 Rutgers State University of New Jersey and a master's and
4 Ph.D. from Massachusetts Institute of Technology.

5 Q And what is -- what are the master's and Ph.D. degrees
6 from MIT?

7 A In civil and environmental engineering.

8 Q Okay. And at the University of Michigan, in addition to
9 the classes that you teach, do you also conduct research?

10 A Yes, I do.

11 Q Can you tell us some of the subject matters -- the
12 subject matter areas that you conduct research?

13 A Right. So research occupies probably the bulk of my
14 time actually. I have in any particular point in time, a
15 number of different research studies. Most of them are
16 dealing with the health effects of air pollutants or other
17 type of pollutants and understanding how people come in
18 contact with toxic agents and what the effects are.

19 I have studied things from asthma to brain health.
20 It's been very diverse.

21 Q Okay. So when were you contacted in this case?

22 A My memory for dates is probably 2020, I think.

23 Q Okay. What were you generally asked to do?

24 A I was asked to review the evidence related to the fire
25 at the Metropolitan, to look at the possibility of adverse or

1 health effects or risks to health.

2 Q Okay. So in doing that, can you kind of walk us through
3 your -- the initial things you considered in making that
4 assessment?

5 A Sure. You know, I tried to get a big picture to
6 understand what was happening with respect to the fire, the
7 possibility of smoke intrusion on the adjacent buildings,
8 residues that might have been left in place, the potential for
9 human exposure or direct contact either by breathing or
10 ingestion or some other, what we call, pathway, which can
11 bring toxics into the body and cause an adverse health effect,
12 and then try to understand what is the overall likelihood that
13 there was an adverse risk to individuals in the apartments
14 there.

15 Q Okay. And I meant to ask you this: How long have you
16 been at the University of Michigan?

17 A Since 1989, which makes it 34 years.

18 Q Okay. So as part of what you do there in addition to
19 your teaching and your research, do you also -- have you also
20 had experience conducting indoor air quality assessments?

21 A Yeah. So many years ago when we thought about air
22 pollution, we thought primarily about outdoor air pollutants.
23 I had the honor of working with a number of pioneers in the
24 indoor air field. So early in the 2000s or actually in the
25 '90s, a lot of my research migrated to the indoor

1 environments.

2 Q Okay. And so you're coming at these assessments from a
3 health perspective; is that fair?

4 A That's fair.

5 Q Okay. So with respect to the different kinds of
6 exposure, did you -- you have a -- you had different kinds of
7 exposure that you're evaluating when you look at the
8 Metropolitan and determine whether there's been any health
9 impact from this fire?

10 A Hypothetically, yes. I mean, there was no actual
11 exposure assessment; so it's -- there's no direct evidence
12 related to exposure other than potentially indicating that
13 maybe the air samples might relate to what people breathe.

14 But the air samples were not in the breathing zones,
15 so it's not really an exposure assessment per se.

16 Q So let me back up. You said there was no health
17 assessment made. Is that -- tell us how that works into your
18 evaluation of what went on with the investigation process.

19 A So to understand a health assessment in a case like
20 this, we are looking for a couple of things. We're looking
21 for the presence of something that is toxic or other stress.

22 In this case, it's just a toxic chemical residue
23 that might be left as a result of char or soot or ash
24 potentially containing hazardous chemicals; chemicals that we
25 know are hazardous based on epidemiology and toxicology.

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1 The second step would be to try to quantify the
2 levels of toxins that were -- would be present so we have an
3 estimate of what is a source term.

4 A third step would be to look at the potential
5 pathways by which people could become exposed to these things.
6 You can have chemicals in close proximity which have no
7 potential for a completed pathway to bring them into my nose
8 or respiratory system or gut or somehow otherwise get into
9 contact with the human body.

10 And then we would want to understand what is the
11 exposure potential, how many people live there, how long are
12 they in the place, and so forth. And then we'd like to
13 understand what is the toxicity, so then we can start putting
14 together the idea that someone is exposed to something and
15 then how toxic it is.

16 And at the end of all this process, we come up with
17 an estimate as to whether there's a reasonable likelihood of
18 there being an adverse effect.

19 This is a risk paradigm which has been developed by
20 National Academy of Sciences, and it has been used for, gosh,
21 40 years now, 30 years.

22 Q Okay. So what you're looking for in -- is it -- you're
23 looking for the toxin levels and whether there is an actual
24 potential impact on humans to summarize it?

25 A Okay.

1 Q My summary, not yours.

2 So with respect to that, the -- you're in the area
3 of public health. Can you explain to us how you make those
4 assessments of whether there's a risk of an adverse health
5 effect; meaning, is that something that -- you're in the area
6 of public health, and you're looking to protect. And tell us
7 how that works and how you evaluate that at the end of the
8 day.

9 A Sure. There are many factors that influence an
10 individual's exposure and susceptibility. And to handle this,
11 we take a very protective stance. So we take reasonable worst
12 case or what you might think of as hypotheticals where someone
13 is doing everything wrong. Okay.

14 And we want to ensure that the possibility of an
15 adverse outcome is very minimal, and so we develop standards.
16 We try to enforce them. We try to get regulatory agencies to
17 recognize these. And so this has resulted in standards from
18 EPA and other agencies that are designed to keep levels of
19 contaminants low.

20 Q And so in your field, is it a fair statement to say that
21 you are looking at this from a very conservative way and
22 trying to err on the side of caution with regard to public
23 health?

24 A Absolutely. So we recognize that agents that are in
25 everyday use may pose some hazards. We want to eliminate

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1 those. So we have things like the Stockholm Convention which
2 essentially banned chemicals. We have air quality standards
3 and many other guidelines. Some of them are irrelevant to
4 this case as well.

5 Q Okay. So am I understand to this -- I have a five-step
6 process of identifying a chemical, levels of toxins, pathways,
7 exposure potential and finally toxicity. None of that was
8 done at the Metropolitan that you're aware of?

9 A Certainly that five-steps process was not done. There
10 were preliminary analyses to try to understand the
11 distribution of soot and char and ash throughout the space,
12 but that's about it. But that's not a quantitative
13 assessment.

14 Q Okay. So it's your opinion that in order to assess a
15 health or safety risk, this additional -- these additional
16 steps have to be taken with toxicity, chemicals, all of those
17 things?

18 A Right. At this point there's no evidence that indicates
19 that there's a risk. What's been said about the case is what
20 I would characterize as a phantom risk, something that's make
21 believe.

22 Q Okay. So let's talk about what was done at the
23 Metropolitan first of all. In looking at this -- in looking
24 at this fire and whether it could have had even an impact on
25 the Metropolitan -- other areas of the Metropolitan, tell us

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1 what you did initially.

2 A Well, initially I reviewed the evidence that you
3 provided, which included a number of walk-throughs,
4 assessments, visual, some exploratory sampling, some follow-up
5 sampling, and video evidence of the fire.

6 I looked at the prevailing winds, the meteorology.
7 I looked at the evidence that was collected. I plotted. I
8 tried to assemble a database of all the sampling that had been
9 taken so I could understand the significance of the residues
10 that were found and where they were found.

11 I looked at the literature with respect to
12 composition of fires and some of the PAHs that had been --
13 these are chemicals, polycyclic aromatic hydrocarbons that
14 were claimed to cause cancer and so forth.

15 I put together very simplified screen level analysis
16 and wrote this up in the report and the supplement to the
17 report.

18 Q Okay. Well, let's talk about the fire, the first step
19 that you talked about, which is tell me what you observed
20 based on your review of videos, review of the weather data,
21 what you observed in terms of potential impact on the doughnut
22 building.

23 A On the doughnut --

24 Q The doughnut building, the finished spaces.

25 A Right. So, of course, I wasn't there, and I'm basing my
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1 opinion on what others have written and, you know, the
2 assessment of the distance between the doughnut building and
3 the fire, which was, I believe, 120 feet or so and the
4 prevailing winds and the photographic and video data, which
5 essentially indicated that the fire burned very rapidly. The
6 plume was affected or lofted upwards. And the ceiling height
7 at that time was about 800 feet, dropping a little bit through
8 the early hours of the morning. So the plume would have
9 largely risen and then spread downwind.

10 Winds were very, very light. So there wasn't a lot
11 of turbulence in or pressure in the adjacent doughnut building
12 to spread the fire and the plume and the particulates. And
13 these are what we call small particles that would include soot
14 and char and ash into that doughnut building.

15 Q So with regard to -- you mentioned the prevailing winds.
16 You're not a meteorologist?

17 A No, I'm not. But I am an atmospheric dispersion
18 modeler. At the urban scale, I've done hundreds of studies
19 looking at the dispersion of plumes from all types of sources,
20 including fires.

21 Q And in this particular case, what did -- data did you
22 access to take a look at the prevailing winds?

23 A I looked at the nearby airport, Birmingham airport,
24 approximately 4 to 5 miles away. I used a service on the web
25 that makes it easy to pull up other datasets. I identified a
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1 few other sites, pulled up the data from there, and got hourly
2 observations from these different sites.

3 Q And you've received some criticism in this case for how
4 you've calculated the winds in the databases that you have
5 accessed. The wind data that you have in your reports and in
6 your opinions, did -- were those based upon generally-accepted
7 databases in your industry?

8 A Well, the data you want for modeling is clear; you'd
9 like to get local data. We don't have any on-site data. So
10 we're using the airport data, which is generally considered to
11 be representative for region, mainly because airport data is
12 collected typically at 10 meters height in a big grassy field,
13 and you don't have local obstructions that would cause wind
14 shifts in direction.

15 Speeds at airports are sometimes different.
16 Directions are sometimes different. I like to look at other
17 sites because it helps to confirm whether or not the data is
18 representative. This is a big issue in dispersion modeling or
19 meteorological analysis.

20 Q That's what you did in this case?

21 A Yes.

22 Q You mentioned dispersion modeling. Is that what you
23 said?

24 A Right.

25 Q Tell us what that is.
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1 A Sure. So we are all experienced to air pollution from
2 local sources like traffic, industry, trains, ships, and train
3 dust, all types of things.

4 In the urban scale, we use a number of dispersion
5 models to try to understand what are the exposures that people
6 experience. And so agencies like, you know, U.S.
7 Environmental Protection Agency has lots of scales of models,
8 and urban scale models is something that we've been doing a
9 lot of in the last, oh, I don't know, 10 or 20 years, looking
10 at impacts of these types of sources.

11 Q And that takes into consideration the buildings and all
12 of the contours of an urban area?

13 A Right. And, in fact, we often use meteorological data
14 combined with many other data sources to get wind fields that
15 represent the curvature of the winds around different sources
16 and so forth. So it's not -- it's a model product actually,
17 not just a single meteorological station.

18 Q And that can happen in an urban environment. You can
19 have winds heading around the corner in different directions
20 than, say, the airport?

21 A Sure.

22 Q So with respect to what you looked at, the weather data
23 that you looked at and the video of the fire you looked at,
24 can you tell us what your conclusions were about the wind and
25 the airflow on the night of the fire in relation to the

1 doughnut building?

2 A Sure. Shortly after the fire started through the next
3 few hours during the intense phase, winds were light or very
4 light. We call -- when there's no specific wind direction
5 that's very clear or below a couple miles per hour, we call
6 this a calm, and winds fell into this calm, light to very
7 light condition for that first phase of the fire.

8 Q Okay. And what about the rest of the fire through the
9 next couple hours?

10 A Yeah. Winds picked up a little bit but would still be
11 considered light.

12 Q So in your opinion, you mentioned pressure, winds and
13 pressure. So in your opinion, am I correct that the lightness
14 or the calmness of the winds did not create some sort of
15 pressure gradient against the doughnut building?

16 A No. And, in fact, winds move for a couple of reasons or
17 we have winds for a couple of reasons. We have high pressure
18 systems. We have low pressure systems. We have areas that
19 are heated or cooled, and hot air will rise and so forth. And
20 that's important in the case of a fire because obviously it's
21 a big source of heat, and air is going to rise and ascend, as
22 I mentioned.

23 Q And from a -- you mentioned the pressure gradient. Why
24 is the pressure gradient important or something you're
25 considering?

1 A Sure. So air in a building like this, for example,
2 comes into the space due to pressure differences. You have
3 either fans or something like that which draw air in. This is
4 due to a pressure difference.

5 A fire -- well, a wind will exert a pressure on the
6 side of the building, allow air to come in through open
7 windows and doors, of course, but also through tiny, little
8 cracks that might be present. So that is one of the major
9 forces in determining the air change in a space. The air
10 change is the rate at which the air is replaced in that space.

11 Q And is -- there's something in your report. You
12 mentioned the word "penetration."?

13 A Correct.

14 Q Can you tell us the significance of that?

15 A Sure. So what we look at is the air change rate, but
16 then we're also concerned with, say, pollutants like particles
17 moving indoors. And we have -- instead of calling it
18 infiltration or airflow rate, we have a particle penetration
19 rate. And that particle penetration rate is lower than the
20 air change rate because particles tend to get stuck in little
21 cracks and crevices and don't move through quite as easily as
22 the air molecules themselves.

23 Q So in terms of -- in terms of assessing a health risk
24 from a fire and potential soot and char in a building, the
25 penetration rate is the key thing you're looking for?

1 A That is correct.

2 Q And the penetration rate is going to be less than the
3 air infiltration rate?

4 A That's correct.

5 Q And so am I correct that the reason you're looking at
6 the wind and the potential pressure differential is to look
7 for a mechanism for that penetration?

8 A That's correct.

9 Q And what did you find at the Metropolitan about the
10 mechanism for penetration into --

11 A Well, there's been no objective assessment of
12 penetration or from -- to my understanding, even air change
13 rates at the space. We do this very routinely. There's a
14 number of standard methods for doing that; so that wasn't
15 established.

16 However, the exterior boundary of the building, the
17 facade of the building would limit airflow through into the
18 space, as would the prevailing winds at the time as well,
19 which were not directed against the space. In fact, quite the
20 opposite.

21 Air would rush into the fire to fill the need to
22 replace the air that had just ascended, and so that would tend
23 to suck air out of those spaces.

24 Q Based on the information that you reviewed, was there
25 any mechanism for penetration of the soot and char combustion

1 byproducts from the phase 6 fire into the doughnut building?

2 A On the evidence that I saw, nothing that suggested
3 significant intrusion or penetration of fire products into
4 that space.

5 Q Okay. And so you mentioned earlier the preliminary
6 data. There was some -- there was sampling done. You called
7 it preliminary.

8 So did you do an analysis of -- once you looked at
9 the fire itself, did you also do an analysis of the data
10 that's been collected prior to the remediation and testing
11 date?

12 A Yes.

13 Q Tell us about that.

14 A Well, there was several waves of investigations using a
15 variety of different types of techniques. These included bulk
16 samples, a couple of those, but most of the samples that were
17 collected were air-o-cell samples. These are what I consider
18 small volume air samples on a little filter, and they included
19 tape lift samples.

20 Q Okay.

21 MR. ELY: Can we pull up Defendant's Exhibit 169,
22 please.

23 Q (BY MR. ELY) So, Dr. Batterman, you recognize -- it's
24 page 2. I'm sorry.

25 Do you recognize this table?

1 A Yes.

2 Q Is that something you prepared?

3 A Yes.

4 Q Can you tell us what you gleaned from this table?

5 A Sure. That is reflecting the wipe samples that -- you
6 know, I'm reading the caption here -- collected by FBS and
7 analyzed by EMSL lab in New Jersey. My screen's gone blank.

8 Q Yeah. We got it back.

9 A Okay. Thank you.

10 And EMSL did a screen-level analysis, and they
11 looked for, as can be seen lower in the table, a variety of
12 things. They looked for combustion byproducts. This is the
13 most relevant thing to the case. But they also looked for
14 other stuff that is typically found in these types of samples.

15 This analysis shows for -- I believe there were 20
16 samples here, and 18 of them had -- blank again. Thank you --
17 either nondetects, which means they found nothing, or levels
18 that were reported as less than 1 percent of material
19 indicated as anything that could be considered fire related.

20 Two of the samples had some char. That included the
21 phase 4 truss and a unit 115 -- screen keeps blanking on me.
22 Sorry about that -- which had 40 percent of material that
23 could be identified by this analysis as char.

24 Q What was your takeaway from these results?

25 A Yeah. So very little, very -- and these samples were
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1 collected in locations that were presumed to have higher
2 levels of fire-related byproducts. Two of 20 showed anything
3 definitive. Loadings weren't excessively high even on these.
4 There was no ash or soot, just some char particle floated
5 down, and a couple made its way into the visual field of the
6 analyst. There were a number of particles in these cases, but
7 90 percent of the samples showed nothing.

8 Q So with respect to the soot samples, was there any soot
9 detected in any of the 20 samples?

10 A No. The lab indicated nondetected. So they didn't even
11 find trace levels.

12 Q How does this impact your assessment of the health risks
13 at the Metropolitan at this point?

14 A Well, this is indicating that in the spaces that were
15 sampled, which again were believed to be ones which could
16 accumulate fire residues, very light accumulation or no
17 accumulation in most of the building. And two of the 20
18 samples showed some accumulation.

19 Q Okay. And as part of your analysis, you also looked at
20 the data collected by Mr. Carlson.

21 MR. ELY: Can we look at Plaintiff's Exhibit 15? Go
22 to page 107, please. Thank you. And could you split screen
23 with page 114.

24 Q (BY MR. ELY) So, Dr. Batterman, these -- you remember
25 reviewing the pre-remediation data from Mr. Carlson?

1 A Yes.

2 Q Okay. So down here on the -- on the right screen is a
3 scale, I guess, for lack of a better term. Do you see that?

4 A Yes.

5 Q So based on the scale Mr. Carlson provided, did you --
6 based on your review of his data, did -- can you tell us what
7 you determined?

8 A Yeah, sure. So I looked at all of Mr. Carlson's data
9 and tried to interpret it. There were problems because there
10 were many issues with the description of the data collection
11 procedure, the records that were available, and so forth.

12 Nonetheless, I took it verbatim, tried to identify
13 samples that were -- and where the samples were collected and
14 tabulated everything in a large workbook. So this is just a
15 beginning of some of the data that he collected on this date,
16 May 8th and 9th, and this essentially are the results that
17 were provided by Mr. Carlson.

18 Q So in looking at potential health risk from soot and
19 char penetration, what kind of results would you be looking
20 for from Mr. Carlson's data using his scale?

21 A Well, the analysis that he provided would be considered
22 a screening analysis. It's kind of is there potential for
23 fire-related residues based on the optical microscopy that was
24 done with these samples? And I believe these samples -- yes,
25 all the samples in here are collected on a little device

1 called an air-o-cell.

2 So these are particles that were trapped on a
3 filter. And you could think of a vacuum cleaner, for example,
4 and you're sucking air into a little filter, and then you are
5 pulling out the filter later and counting particles.

6 And these samples were largely collected in both the
7 ambient air, air in a space like this, as well as in spaces
8 that -- like doorframes or trusses or things like this that
9 folks would typically not have access to.

10 Anyway, he has indicated that he found some char,
11 some soot in cases, and carbon black, another type of soot,
12 and mold with -- in a number of these different samples.

13 Q Okay.

14 MR. ELY: Can we go to page 108 on the left side,
15 please. Leave the right the same. And then 109 and then 110.

16 Q (BY MR. ELY) So, Dr. Batterman, you see beginning on
17 page 110, you also did bulk and tease tape samples, correct?

18 A Yes.

19 Q So is there any -- in terms of the analysis of the
20 numbers, is there any difference in your mind in relation to
21 his scale between the air-o-cell and bulk tease tape?

22 A Yes. In fact, if we just constrain or restrict our
23 analysis to the air-o-cell, the air samples, these use
24 different sample volumes, and he essentially pulled 30 liters
25 in some cases, 75 liters in other cases; and I believe in some
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1 cases, it wasn't specified. And the scale adjustment that he
2 used did not appear to adjust for the difference in volumes.

3 This makes it very challenging to interpret. I can
4 pull in a very large volume of air and find particles and get
5 a higher count and even though everything else might be the
6 same as the smaller volume of air.

7 Also there was no sampling in a controlled case,
8 which is actually very important, and so I don't know why he
9 found these particles unless this material was disturbed
10 unless they arose from other sources. We would not expect for
11 a fire that took place, what, in September 27th to leave
12 particles airborne until May 8th or 9th. And so these
13 particles don't remain suspended for more than perhaps a few
14 days at most. And so even at that level, they would be
15 falling out of the air or sticking onto surfaces.

16 So the reason these airborne particles are there is
17 speculative, but it could be material was disturbed and the
18 particles on a surface were entrained. Everybody's familiar
19 with vacuuming or following a street sweeper or something like
20 that and seeing dust behind it. Or they were outdoors in
21 ambient air, which is certainly possible, and -- which is
22 definitely possible.

23 And we do have some air monitoring in Birmingham,
24 and I can talk about that. But the particle levels out there
25 certainly contain soot and so forth. And so I can't, without

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1 more information, identify the source of these particles, but
2 it's not likely to be the fire unless material was disturbed.
3 This applies to the airborne samples.

4 THE COURT: Let's take a break.

5 MR. ELY: Absolutely.

6 THE COURT: About 15 minutes or so. I ask that you
7 not discuss the case among yourselves or with others. Take
8 about a 15-minute break.

9 (A recess was taken.)

10 (The following proceedings were had in the presence
11 of the jury:)

12 DIRECT EXAMINATION (continued) BY MR. ELY:

13 Q Dr. Batterman, we were talking about the sample results,
14 testing results that you had reviewed as part of your work in
15 this file.

16 Based on your review of the many samples, was there
17 anything in there in terms of frequency or concentration, soot
18 and char, that indicated a potential health risk at the
19 Metropolitan from the phase 6 fire?

20 A No, not directly. What was performed was a screening
21 analysis designed to identify, I think, the potential of
22 finding char, soot, black carbon, and so forth, and nothing
23 directly related to a quantification of the chemicals that
24 might pose a health risk.

25 Q Okay. So moving from the sampling data, you made
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1 observations from photographs and whatnot of the conditions of
2 the Metropolitan after the fire, correct?

3 A Yes.

4 Q The internal spaces?

5 A Yes.

6 Q Did you have some -- did -- strike that.

7 With respect to a potential health risk, tell us
8 what you would expect to see in terms of visual condition of
9 the internal spaces, interior spaces of the Metropolitan.

10 A That would pose a health risk?

11 Q Yes, sir.

12 A Yeah. I would expect to see heavy staining,
13 discoloration, accumulation of residues easily visible to the
14 eye on a variety of surfaces distributed throughout the space.

15 Q And did you see any of that?

16 A Very little of that.

17 Q So with respect to the -- moving from the living areas
18 into the interstitial spaces, part of the claims in this case
19 is that the interstitial spaces have soot and char from the
20 phase 6 fire. You understand that?

21 A Yes.

22 Q Tell us how the location of the soot and char impacts
23 your analysis of health risks.

24 A Sure. So the approach here taken is that this is an
25 external fire to structures 1 to 3, the doughnut building, and
903

1 4 and 5, I guess, and the smoke would need to move in, cross
2 the building boundary one way or another and enter the living
3 spaces for it to pose a health risk.

4 The other part of the presumption is that the smoke
5 and other fire residues would make it only partly into that
6 space and end up residing in interstitial -- what we're
7 calling, interstitial spaces, which are wall cavities, for
8 example, or chases where pipes run or potentially heating and
9 ventilating and air conditioning ductwork and plenums.

10 So the theory here is that heavy residues
11 accumulated in either those interstitial spaces or in the
12 living compartment where people are, and the sampling didn't
13 indicate any of that.

14 Q Okay. Is the location in the interstitial space, the
15 fact that it's located in the wall cavities, does that impact
16 your assessment of potential health risk?

17 A It does. If you do find accumulation in interstitial
18 space, the next step of the process is to see if there's a
19 pathway by which that toxin or contaminant can come out and
20 actually expose people. And when I mean expose people, I'm
21 talking about you inhaling a particle or a vapor or ingesting
22 the same that would then accumulate in your body and
23 potentially or possibly cause an adverse health effect.

24 So a product or a toxin or a pollutant which is in
25 interstitial space does not have that pathway completed. You

1 are not breathing the air in that interstitial space directly.
2 Some of it potentially can diffuse out very slowly. Possibly
3 you won't have direct contact with that. So it very much
4 impacts that exposure or pathway analysis that I'm talking
5 about.

6 Q Okay. And so you mentioned very early on when we
7 started talking about what kind of air quality assessment
8 would need to take place in order to ascertain whether there
9 is a health risk as a result of the fire.

10 Can you walk us through exactly what that would
11 entail?

12 A Sure. And we're talking in particular about the
13 Metropolitan case where a fire took place half a year or more
14 before the assessment. At that point, as I indicated earlier,
15 I would not find airborne particles. Those have long gone.
16 They've settled onto surfaces possibly in the living space,
17 possibly in the interstitial space, which is the theory here.

18 The assessment to understand the potential for a
19 health risk would be, first, to see if there is anything
20 present. This can be done by bulk sampling in an interstitial
21 space, in a heating duct, in a living space, wherever you
22 think there might be material to see if there is anything
23 there, and that helps us because it would identify what are
24 the toxins of concern, whether they're benzoapylene, for
25 example, which is one of the chemicals that the theory here

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1 advanced by Metropolitan is claiming is a health risk, a
2 carcinogen.

3 So if it's present in a bulk sample or a wipe
4 sample, then there is a possibility that I can find it in an
5 air sample. And the air sample is designed to be reflective
6 of what people would breathe.

7 So following this bulk analysis, if I do find some
8 materials there, then my next step would be to undertake air
9 sampling in representative spaces or even worst-case spaces in
10 the structure, looking for things like these PAHs or this
11 benzoapyrene, for example.

12 I would want to collect samples that I believe are
13 representative, and these would typically be long-term
14 samples; take a couple of days to collect these samples.

15 Q Okay. So what you're looking for, as I understand it,
16 you're looking for the actual chemicals that can harm someone?

17 A That's right.

18 Q Okay. So based upon the information that you've
19 reviewed in the case from how the fire behaved, the winds,
20 penetration potential, the sampling that you reviewed, if you
21 were to conduct that kind of sampling, what would you have
22 expected to find?

23 A I would expect not to find anything reflective of a
24 fire, but more of general environmental sources that
25 contribute these kinds of cases. I'm talking about air

1 sampling here now.

2 Q Okay. And is it your opinion that based on the
3 information you reviewed, there is no evidence that you can
4 point to that would lead you to believe that there is a
5 potential for -- a potential risk to the tenants as a result
6 of the fire?

7 A No. There's no evidence indicating a risk from
8 fire-related residue.

9 Q Okay.

10 MR. ELY: Pass the witness.

11 CROSS-EXAMINATION BY MR. ABRAMS:

12 Q Mr. Batterman, good morning. My name is Mike Abrams.

13 A Nice to meet you.

14 Q Nice to meet you.

15 Just to confirm, you were not present on the night
16 of the fire, correct?

17 A That's correct.

18 Q You have no reason to disagree with the statements from
19 the Birmingham Fire Department regarding the severity of the
20 fire or anything that's in the fire reports, correct?

21 A No.

22 Q You agree that combustion byproducts such as soot, ash,
23 char can cause severe health effects, correct?

24 A Yes.

25 Q And just so we have it clear, we've been talking about
907

1 health effects. Does your expertise extend to the effects of
2 soot, char, and ash have on building materials such as copper
3 or wires and things like that?

4 A To an extent, yes.

5 Q But that's not part of your report, correct?

6 A That's not part of my report.

7 Q So because the -- back to the health effects. Because
8 soot, char, and ash can contain toxic components such as lead,
9 arsenic, PAH, pesticides, dioxans, and cresols, correct?

10 A Yes.

11 Q In fact, soot, char, and ash can contain chemicals that
12 are considered carcinogenic, cancer causing, correct?

13 A Yes.

14 Q By the way, just so we define our terms, PAH, that's
15 polycyclic aromatic hydrocarbons, correct?

16 A Correct.

17 Q And you agree that PAHs are toxic to humans and are thus
18 a health concern?

19 A Yeah, generally speaking. I mean, we focus on 16
20 different PAHs in the commonly-accepted analytical approaches.
21 There are many more than that. And of those 16, six of them
22 are considered carcinogenic or possibly carcinogenic.

23 Q And you agree that PAHs can remain on a building surface
24 after being deposited as combustion residues after a fire in
25 theory?

1 A Yes.

2 Q Okay.

3 A Well, they are part of the combustion residue.

4 Q Right. So am I correct?

5 A Yes.

6 Q Okay. And the major health concern related to PAHs is
7 chronic exposure that can increase someone's risk of cancer,
8 correct?

9 A Yes.

10 Q And at least -- you mentioned there's all kinds of
11 different PAHs, but at least two of the PAHs are probable
12 human carcinogens and four others are possible carcinogens,
13 correct?

14 A Right.

15 Q Some of the cancer effects of these PAHs include tumors
16 in the stomach, liver, or auditory canals, correct?

17 A Yes.

18 Q And so your report also mentions benzopyrene?

19 A Benzoapyrene.

20 Q Benzoapyrene?

21 A Yes.

22 Q Okay. And benzoapyrene also can cause noncancerous
23 effects, health effects, correct?

24 A Yes.

25 Q Such as developmental or immunological or reproductive
909

1 effects, correct?

2 A Yes.

3 Q And you would agree that individuals may be exposed to
4 combustion residues that could be cancerous if these residues
5 or components of them make their way into occupied living
6 spaces and are inhaled, correct?

7 A Yes.

8 Q We talked about your review of Carlson's work and EMSL's
9 work. And just if you remember, EMSL's work were wipe
10 samples, correct?

11 A Yes.

12 Q And Carlson's work, what you -- you talked about air
13 samples, but he also took tape lifts, correct?

14 A Correct.

15 Q And you would agree with me that particulate emissions
16 from a fire may enter hidden spaces of the building such as
17 wall cavities, correct?

18 A Yes.

19 Q And this can happen as a result of normal air exchange,
20 air infiltration, and pollutant penetration, correct?

21 A Yes.

22 Q And these particulates can cause -- well, they can cause
23 exposure -- well, strike that. We already talked about that.

24 You would agree with me that contaminants can also
25 settle and deposit on building surfaces, both exposed surfaces

1 and hidden surfaces, in the building cavities during or after
2 a fire, correct?

3 A Yes.

4 Q And you would agree with me that particulates may also
5 penetrate the building envelope or the HVAC system or be
6 absorbed in porous materials like filters, insulation, or
7 foam, correct?

8 A Yes.

9 Q You would agree with me that emissions can off gas from
10 where they have settled, deposited, or absorbed, correct?

11 A Some of the emissions can.

12 Q Okay. And we're talking about soot, char, ash, correct?

13 A Yes.

14 Q And we -- briefly, just for those of us who don't know,
15 off gas; tell us what that is.

16 A Sure. Off gas is kind of like evaporation. So, you
17 know, you spill water and it evaporates. So like in this
18 case, we're talking about something which is a solid doing the
19 same sort of thing, off gassing a vapor.

20 Q Okay.

21 A But it can also move into a liquid form as well. But of
22 concern here is the vapor.

23 Q And you had mentioned about particles becoming
24 disturbed. You would agree with me that settled or deposited
25 contaminants can also become disturbed by vibration, movement,

911

1 sweeping, or high-velocity airflow and entrained into the air,
2 correct?

3 A Yes.

4 Q And this could include construction or remediation
5 activities, correct?

6 A Potentially.

7 Q Depends on what they are?

8 A It depends on many factors, yes. I mean, as I
9 mentioned, a demolition, for example, where material is torn
10 out would potentially liberate, entrain some of these
11 particles.

12 Q So that would include, if you're cutting wallboard,
13 moving wallboard around and such?

14 A That was contaminated, yes.

15 Q Yeah. All right. Let's talk about the meteorological
16 data. First of all, I can't remember. When were you first at
17 the Metropolitan?

18 A I have not visited the site.

19 Q Okay. I'm sorry. You never went to the Metropolitan?

20 A I have not.

21 Q Okay. And I think you said you're not a meteorologist,
22 correct, but you've done some weather work?

23 A I've done hundreds of applications of dispersion
24 modeling, which is driven by meteorological processes. I'm
25 very familiar with meteorological data.

1 Q Okay. But you're familiar with the data, but you're
2 not -- I'm correct, you're not a meteorologist yourself?

3 A No.

4 Q In your report, you use some meteorological data from
5 the Birmingham and Bessemer, Alabama, airports, correct?

6 A Yes.

7 MR. ABRAMS: Can we put up slide 7.

8 Q (BY MR. ABRAMS) So this is figure 3 from page 13 of your
9 report, and this is the map showing the locations of the two
10 airports and the Metropolitan, correct?

11 A Yes.

12 Q Okay. And the Birmingham airport is 5.5 miles northeast
13 of the Metropolitan approximately?

14 A Approximately.

15 Q And the --

16 A Well, the -- technically the geographic coordinates of
17 the weather station are that distance.

18 Q Right. And that's what your report is focusing on?

19 A Right. The airport --

20 Q 5.5 from your report?

21 A The airport is a little bit closer.

22 Q I see. Right. So to be precise, the weather station
23 that you're using the data from, from the Birmingham airport,
24 is 5.5 miles away?

25 A Based on the coordinates I have for it, yes.

1 Q Right. Because your point is you didn't actually go out
2 there, but based on the data that you were able to -- you've
3 Googled on or Google Maps, you determined it's 5.5 miles. I'm
4 not arguing with you about it.

5 A Okay.

6 Q I'm just getting it in the record.

7 But 5.5 miles, right?

8 A Approximately, yes.

9 Q And the Bessemer airport is 15.9 miles south, southwest
10 of the Metropolitan, correct?

11 A Yes.

12 Q All right.

13 MR. ABRAMS: Can we put up slide 8.

14 Q (BY MR. ABRAMS) So this is just a satellite image of
15 Google Earth of the three locations between the Birmingham
16 airport and the Bessemer airport and the Metropolitan.

17 You would agree that the topography or the physical
18 environment immediately surrounding the airports is different
19 than that of the Metropolitan, correct?

20 A Sure.

21 Q The Metropolitan is in a more developed commercial area,
22 correct, that's surrounded by other buildings?

23 A It's in an urban area, yes.

24 Q And the airports are not surrounded by commercial
25 buildings, correct?

1 A No.

2 Q And you would agree with me that the physical
3 environment surrounding a property can affect wind flow near
4 that property, correct?

5 A Sure.

6 Q And it can affect wind direction?

7 A Yes.

8 Q I think you've referred to that. Okay.

9 And because the Metropolitan is a commercial area,
10 your report concludes that sheltering effects from nearby
11 buildings tends to reduce wind speed from the measurements in
12 the airport, correct?

13 A Generally does, yes.

14 Q But you would agree with me that wind speeds can
15 actually increase between buildings, right?

16 A Sure. There can be a channeling effect, for example.

17 Q Anytime anyone's walking through a big building, you can
18 have that -- you can understand that phenomena where wind
19 speeds can increase between buildings?

20 A Sure.

21 Q Okay. You did not -- tell me if I'm incorrect about
22 this. In your report, you don't indicate that you ever took
23 wind speed readings from around the property at the time -- at
24 a time and then compared them to the wind readings at the
25 Birmingham airport and the Bessemer airport to prove that they

915

1 were representative of the normal conditions, correct?

2 A No. I haven't been to the site, and I'm not quite sure
3 what normal conditions are.

4 Q Okay. Well, you didn't -- you didn't direct anyone to
5 take a wind reading at the Metropolitan and have two other
6 people take wind readings at Bessemer airport and Birmingham
7 airport at the same time?

8 A No. There was no need.

9 Q What's that?

10 A There was no need.

11 Q Okay. But you didn't do that?

12 A No.

13 Q Okay. All right. Let's talk about -- well, a little
14 bit more about Birmingham.

15 You mentioned just very briefly in your direct
16 testimony a study about the environment of Birmingham,
17 Alabama, right?

18 A Yes.

19 Q Okay. And that's -- that was -- and you cited it in
20 your report. I read it. That was data that was collected
21 back in 2005 and 2006, correct?

22 A I believe so.

23 Q Okay. It was published a few years later, correct?

24 A Yes.

25 Q Okay. So more than a decade before the fire. And that
916

1 study chose a couple of locations near industrial facilities,
2 correct?

3 A I believe so.

4 Q Okay.

5 A I think they had four locations.

6 Q Yeah, four or five. I don't remember. But they were
7 near industrial locations?

8 A Yes.

9 Q All right. Let's talk about infiltration. You do
10 agree, based on your report, that smoke or other fire-related
11 particulates can enter a building by crossing through the
12 building envelope such as zip sheathing through either a
13 mechanical air change -- exchange, open windows, doors, and
14 gaps and leaks in the envelope, correct?

15 A Yes.

16 Q And infiltration of fire-related particles can also
17 occur where there's a pressure difference across the building
18 envelope, correct?

19 A Correct.

20 Q And that pressure difference can occur from either winds
21 or HVAC systems operating, correct?

22 A Yes.

23 Q And is it your understanding that the HVAC system was
24 operating on the night of the fire, correct?

25 A I believe it was.

917

1 Q All right. And when assessing the ability of
2 fire-related particles to enter the building envelope, you
3 agree that it would be important to know how the Metropolitan
4 was actually built and what the building envelope actually
5 looked like?

6 A Yes.

7 Q Okay. And since you didn't -- you weren't there
8 physically in person, you relied on blueprints, correct?

9 A I relied primarily on observations and blueprints and
10 the other experts, yes.

11 Q Okay.

12 MR. ABRAMS: No further questions.

13 MR. ELY: Briefly, Your Honor.

14 MR. ABRAMS: Thank you.

15 REDIRECT EXAMINATION BY MR. ELY:

16 Q Dr. Batterman, Mr. Abrams was talking with you about the
17 potentially cancerous effects of some of these chemicals, the
18 PAHs and the -- I can't pronounce it -- benzo --

19 A Benzoapyrene.

20 Q The benzo chemical.

21 Have you done an assessment here of what kind of
22 volume of soot and char from the phase 6 fire it would take to
23 create that kind of carcinogenic long-term cancer risk?

24 A Yes, I did.

25 Q Can you tell us about that?

1 A Sure. I was very interested in this because we look at
2 a lot of chemicals routinely, and we try to understand what
3 their impacts or potential impacts are on health.

4 And so what I did was take what you characterized
5 earlier as a protective stance or a conservative stance, kind
6 of a worst-case scenario analysis. And what I found was for
7 the soot and char and ash containing levels that we expect to
8 see of these carcinogenic compounds, higher levels that we
9 would expect to see under scenarios that were worst case, a
10 person staying in the apartment 24/7, 365 for ten years, never
11 leaving; for air change rates that were reflective of the
12 ventilation that we would expect for the worst chemical of the
13 PAHs that were identified for the higher end of the toxic
14 compound that is found in fire-related materials, I did some
15 calculations that showed you'd have to have ounces to pounds
16 of soot deposited in the space for a person to get that kind
17 of exposure that would lead to a tumor.

18 Q Okay. And based on your review of all of the evidence
19 that was provided to you, did you see any indication that soot
20 and char levels were even remotely close to that level in the
21 Metropolitan?

22 A No. That would be like painting walls with soot and
23 char, and there's nothing like that. There's traces in cases,
24 but not the kind of deposition that could lead to off gassing
25 or contact that would confer a health risk like that.

1 MR. ELY: Thank you.

2 MR. ABRAMS: One quick recross, Your Honor.

3 RECROSS-EXAMINATION BY MR. ABRAMS:

4 Q Dr. Batterman, on this topic, you recognize like when
5 you read Mr. Carlson's data, he took -- he took data from 72
6 locations, correct?

7 A At least, yes.

8 Q What's that?

9 A Yes.

10 Q Well, 72 locations before remediation, correct?

11 A Yes.

12 Q He took more samples as testing to make sure the
13 remediation worked, correct?

14 A Yes.

15 Q Is that what you were getting at?

16 A Yes.

17 Q Okay. Right. So at the time of the remediation, there
18 were 72 samples. And there were other samples taken at the
19 Metropolitan, but there wasn't a sample taken from every wall
20 cavity, every room, every air duct, correct?

21 A Of course.

22 MR. ABRAMS: Thank you, Dr. Batterman. I apologize.
23 I called you Mr. Batterman. Dr. Batterman.

24 THE WITNESS: No worries.

25 MR. ELY: Nothing further, Your Honor.

1 THE COURT: Thank you. The witness may step down.
2 KRISTIN STAKELY, being duly sworn by the courtroom deputy,
3 testified:

4 DIRECT EXAMINATION BY MS. WIGGINS:

5 Q Please state your name for the court.

6 A Kristin Stakely. I go by Kristy.

7 Q Ms. Stakely, how old are you?

8 A 28.

9 Q And where do you reside?

10 A I'm in Birmingham, Alabama.

11 Q When did you move to Birmingham, Alabama?

12 A In September of 2018.

13 Q Where did you move to when you moved to Birmingham,
14 Alabama?

15 A The Metropolitan Apartments.

16 Q And do you remember what unit you lived in at the
17 Metropolitan Apartments?

18 A I believe it was 418.

19 MS. WIGGINS: Can we have Defendant's Exhibit 185,
20 please.

21 Q (BY MS. WIGGINS) Ms. Stakely, on the screen in front of
22 you to the left is Defendant's 185, which is a map of the
23 Metropolitan.

24 Now, can you describe -- can you point to where your
25 unit is on this map?

1 A Yes. It's at the bottom, I believe.

2 Q Well, first, let me ask you, which of those buildings is
3 it in?

4 A It's the one on the left.

5 Q Is it the one that's shaped with the hole in the middle
6 of it?

7 A I'm sorry. It's hard for me to see.

8 Q I know those numbers are small to read.

9 A Yes. It's the one with the hole in the middle, and it's
10 the one at the bottom of that.

11 Q So your unit is in this building?

12 A Yes, that's correct.

13 Q Okay. And what month did you tell us you moved into the
14 Metropolitan, Ms. Stakely?

15 A I believe it was September 5th.

16 Q Of what year?

17 A 2018.

18 Q Were there other people living at the Metropolitan when
19 you moved into it?

20 A Just a couple.

21 Q Now, did you have any problems with your unit when you
22 first moved in?

23 A Yes. Technically I was supposed to move into another
24 unit; but when I arrived, they didn't have that one ready. So
25 I ended up then re-signing, I believe, for that particular

922

1 unit. So my original one that I was supposed to move into
2 wasn't ready at all.

3 Q So you moved into a different unit?

4 A Correct.

5 Q And that unit you moved into was unit 418?

6 A That's correct.

7 Q Okay. So we've heard a lot of testimony in this case
8 about a fire that occurred on September -- the very early
9 morning hours of September the 27th, 2018. Were you at home
10 that night?

11 A I was.

12 Q And were there any major life events going on for you
13 around that time?

14 A Yes. I was taking the final part of my CPA three days
15 later, and I had started my first, you know, big job that
16 Monday.

17 Q Can you tell me what the CPA is?

18 A It's the certified public accounting exam, and there's
19 four parts. Each part is about three to four hours of the
20 test. So I was taking my last one.

21 MR. ABRAMS: Your Honor, may we approach?

22 (Counsel approached the bench and the following
23 proceedings were had:)

24 MR. ABRAMS: What's the relevance here?

25 MS. WIGGINS: She's a witness to the fire, and this
923

1 is what's happening in her life at the time of the fire.

2 MR. ABRAMS: That doesn't matter.

3 THE COURT: What's happening in her life doesn't
4 matter. She can be a witness to the fire.

5 (The proceedings returned to open court.)

6 Q (BY MS. WIGGINS) Ms. Stakely, when did you first become
7 aware there was a fire in the Metropolitan on September the
8 27th, 2018?

9 A That morning. I think it was about 12 a.m. when a
10 police was banging on my door.

11 Q What did the officer tell you?

12 A She told me that there was a fire in the building next
13 door and that I needed to get out immediately.

14 Q Now, before the officer told you that, did you have any
15 idea that there was a fire going on?

16 A I had no idea.

17 Q So what did you do next?

18 A I asked if I had time to put clothes on and get out, and
19 so I left.

20 Q Did the officer tell you, you had to time to put on
21 clothes before you left?

22 A Yes, she did.

23 Q So while you were getting dressed and leaving the
24 building, did you hear any alarms going off?

25 A There were no alarms going off.

1 Q Do you know if the fire alarms ever sounded?

2 A They did, yes.

3 Q How do you know that?

4 A Well, I remember I had asked the property manager. I
5 was like, Why did the fire alarms not go off? Why did we not
6 know? Then she explained to me that they didn't, like, pull
7 the fire alarms or anything because they wanted to make sure
8 that everybody got out the door that was, like, the safe exit.
9 And then she said then the fire department or one of the
10 police officers ended up pulling the alarm just to make sure
11 everybody had left.

12 Q So once you exited the building, where did you go?

13 A I stood on the side of the road. That's it. And I
14 watched it burn down. And then that night, I ended up getting
15 a hotel room.

16 Q Now, from where you were standing on the side of the
17 road, could you see the fire?

18 A Yes.

19 Q And could you see the building that you lived in?

20 A Yes.

21 Q Do you recall at any point whether the lights went off
22 in the building that you lived in?

23 A I don't remember when, but I believe that they did.

24 Q Okay. Now, you said you eventually went to a hotel?

25 A Yes.

1 Q How long did you stand on the street and watch the fire
2 before you went to the hotel?

3 A The whole time, I think, until maybe like 4:45 a.m.
4 Finally got in contact with my parents, and my dad was like --

5 THE COURT: Counsel approach the bench, please.

6 (Counsel approached the bench and the following
7 proceedings were had:)

8 THE COURT: I'm failing to see the relevance of this
9 testimony.

10 MS. WIGGINS: Well, she has personal knowledge of
11 the fire, and the fire is the mechanism that plaintiff claims
12 is how the contamination --

13 THE COURT: What's her knowledge about -- knowledge
14 of the fire?

15 MS. WIGGINS: Her observations of the fire. We can
16 move on.

17 THE COURT: Objection sustained.

18 (The proceedings returned to open court.)

19 Q (BY MS. WIGGINS) Ms. Stakely, you were not allowed to
20 return to your apartment for a period of time immediately
21 following the fire, correct?

22 A Yes.

23 Q And there's been testimony that residents were allowed
24 back into the Metropolitan sometime in mid to late October,
25 around October 20th, 2018. Does that sound accurate to you?

1 A That does.

2 Q And did you move back into the Metropolitan at that
3 time?

4 A I did.

5 Q Did you move back into the same apartment?

6 A Yes.

7 Q When you moved back into unit 418, did you see dark
8 staining anywhere in your apartment?

9 A No.

10 Q Did you see it on the countertops?

11 A No.

12 Q Did you see it in the cabinets?

13 A No.

14 Q Did you see it on the white walls?

15 A No.

16 Q Did you see it on the air conditioning vents?

17 A No.

18 Q Did you see it in the hallways?

19 A No.

20 Q Did you see it in the lobby area?

21 A I did not.

22 Q Did your apartment smell like smoke?

23 A It didn't.

24 Q Now, after you returned to the Metropolitan in October
25 of 2018, how much longer did you live at the Metropolitan?

927

1 | A I lived there until July of 2019. I mean, June of 2019.

2 MS. WIGGINS: Can we show Defendant's Exhibit 16,
3 please.

4 Q (BY MS. WIGGINGS) Ms. Stakely, do you recognize
5 Defendant's Exhibit 16?

6 | A I do.

7 Q What is Defendant's Exhibit 16?

8 A It's an eviction notice. I received it via email. I
9 was not in the country. I was in Europe, and I -- yeah, it's
10 the eviction letter.

11 Q Ms. Stakely, can you read about three-fourths of the way
12 down on that same paragraph where there is some highlighting.
13 On what date does it say your belongings can remain in the
14 apartment till?

15 A Looks like our belongings could remain in the apartment
16 until July 8th.

17 Q Were you able to get your belongings out of the
18 apartment before July 8th?

19 | A No.

20 MR. ABRAMS: Your Honor, can I approach?

21 (Counsel approached the bench and the following
22 proceedings were had:)

23 MR. ABRAMS: Objection, relevance. What are we
24 talking about?

25 THE COURT: So far I see none.
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1 MS. WIGGINS: Your Honor, they're claiming lost
2 rents. This is -- she's a fact witness.

3 THE COURT: This has already been testified to.

4 MR. ELY: Judge, can she testify to her observations
5 of the building for the time period that she was living there?

6 MR. ABRAMS: She already did.

7 THE COURT: She's already testified to that.

8 MR. ELY: Okay.

9 THE COURT: Yeah. What else?

10 MR. ELY: We'll finish.

11 (The proceedings returned to open court.)

12 Q (BY MS. WIGGINS) Ms. Stakely, when you were immediately
13 evicted from the Metropolitan, where did --

14 THE COURT: I think we're through with this witness
15 unless you have some cross.

16 MR. ABRAMS: I do, Your Honor.

17 CROSS-EXAMINATION BY MR. ABRAMS:

18 Q Ms. Stakely, good morning. Just briefly, you were a
19 plaintiff in a lawsuit that was filed against Maxus
20 Metropolitan, correct?

21 A That's correct.

22 Q It's the -- you're one of the -- well, you were a
23 plaintiff. It wasn't a class action, but there were a number
24 of plaintiffs. You were one of them, correct?

25 A Yes.

1 Q And one of the allegations that you made -- and I have a
2 copy here if you don't have it memorized. This is a copy of
3 the petition that you filed in that case, correct?

4 A Yes.

5 Q And if you turn to paragraph 52, one of the things you
6 allege is that Maxus knew or should have known, with the
7 exercise of reasonable diligence, that the fire effects to
8 phases 1 through 3 was extensive with such damage including
9 the entry of soot and other toxins into the air circulation,
10 heating and cooling systems at the Metropolitan, correct?

11 A Yes. So --

12 Q And --

13 A I mean, I was told that.

14 Q Well, that's what you've alleged in this lawsuit, right?

15 A I mean, that's what we were told in our eviction; that
16 it was unhealthy to live here because of those reasons.

17 Q Right. But you also -- you allege that you were subject
18 to these dangers, correct?

19 A That is what I was told.

20 Q Right. And you filed a lawsuit about it, right?

21 A I mean, to get rent money back that I was owed, yes.

22 Q Well, it was more than rent money, right? Let's go one
23 more.

24 In paragraph 53, you allege many of these toxins
25 from the fire entered the existing living spaces because of
930

1 failures on behalf of Bomasada and Maxus in operating the
2 Metropolitan, correct?

3 A Once again, that is what I was told.

4 Q But you allege that unhealthy toxins entered living
5 spaces, correct?

6 A Right. I didn't perform any testing over it, but it was
7 what I was told by the people that I trusted to provide myself
8 a safe living space.

9 Q Right. And I'm not suggesting you did the testing, but
10 you had a lawyer who was representing you, correct?

11 A Yes.

12 Q And this case resulted in a settlement, correct?

13 A We settled it.

14 Q Yeah. You received -- I'm not going to ask you the
15 amount unless you want to say, but you received a monetary
16 settlement for this case, correct?

17 A I did.

18 Q Okay.

19 MR. ABRAMS: No further questions.

20 MS. WIGGINS: Briefly, Your Honor.

21 REDIRECT EXAMINATION BY MS. WIGGINS:

22 Q Ms. Stakely, you just confirmed that you were
23 represented by an attorney in your lawsuit against Maxus,
24 correct?

25 A That's correct.

1 Q Were you contacted within the last week by an attorney
2 at the Lathrop firm regarding that settlement?

3 A I was.

4 Q Is that Lathrop attorney in this courtroom right now?

5 A Yes.

6 MR. ABRAMS: Your Honor, can we approach?

7 MS. WIGGINS: We're done, Your Honor.

8 THE COURT: Yes, you are.

9 The witness can step down.

10 WILLIAM BRADLEY STILES, being duly sworn by the courtroom
11 deputy, testified:

12 DIRECT EXAMINATION BY MR. ELY:

13 Q Could you please state your name for the record.

14 A My full name is William Bradley Stiles.

15 Q Mr. Stiles, where do you reside?

16 A Currently Hoover, Alabama.

17 Q Are you currently employed?

18 A Yes, I am.

19 Q With what company?

20 A Safety Environmental Laboratories and Consulting
21 Incorporated.

22 Q Where are they located?

23 A Pelham, Alabama.

24 Q What is the business of Safety -- I'm going to call you
25 guys SELC; is that okay?

932

1 A Absolutely.

2 Q What is SELC's business?

3 A We are an environmental consulting firm who also has
4 accredited laboratory services.

5 Q Okay. And so take me through, if you would, please,
6 kind of the gamut of what you do.

7 A Sure. Most of what I do is field inspections. So we go
8 around and survey buildings for environmental hazards such as
9 mold, asbestos, lead paint. Those are the big three.

10 Q And if you would, please, tell us your educational
11 background.

12 A Sure. I have a Master's Degree in Environmental Science
13 Management and Public Administration from Jacksonville State
14 University.

15 Q Okay. And currently what is your title at SELC?

16 A I'm the director of operations.

17 Q Okay. How long have you been in that position as
18 director of operations?

19 A Since 2012.

20 Q Okay. Do you have any certifications?

21 A I have several certifications in asbestos and indoor
22 environmental consulting.

23 Q Okay. So -- and let me back up.

24 Prior to 2012, when you became director of
25 operations at SELC, were you also working at SELC? Where were
933

1 you working?

2 A Also at SELC.

3 Q How long have you been at SELC total?

4 A Since 2007; so 16 years in September.

5 Q So your first four years there, what did you do?

6 A I was an environmental technician for the first year,
7 and then I became a project manager after that, and again was
8 promoted to director in 2012.

9 Q As an environmental technician, what did you do?

10 A Go out and actually do field inspection work.

11 Q Okay. Did you conduct sampling?

12 A Yes.

13 Q Have you received any training in your sampling -- in
14 sampling collection methods, tape lift samples, wipe samples,
15 that kind of thing?

16 A Yes.

17 Q Tell me about that, if you would, please.

18 A Most of the training that I received was hands-on
19 training or on-the-job training from superiors who are
20 collectively certified industrial hygienists.

21 Q Okay.

22 MR. ELY: Can we put up Defendant's Exhibit 11,
23 please.

24 Q (BY MR. ELY) Okay. Mr. Stiles, have you seen this
25 email, this exchange of emails before?

1 A Yes, I have.

2 Q Tell me what I'm looking at.

3 A This is email correspondence between myself and Alex
4 Stehl with Maxus.

5 Q Okay. Let's go to the last page of it so you can see
6 it. It looks like it's working bottom up. Okay. One more
7 up. Thank you.

8 So this email looks like it's going up as we get new
9 emails. So this is the first email in the chain.

10 If you could take a look at that, who's Cary Case?

11 A I'm honestly not sure. I was -- I don't believe I ever
12 talked to Cary.

13 Q So take a look at that email and see if you can explain
14 to me who first contacted you about work at the Metropolitan?

15 A Alex Stehl.

16 Q Okay. Alex contacted you first?

17 A I believe so, yes.

18 Q Okay.

19 A Via phone call.

20 Q Okay. So Tuesday, April 9th, you're contacted. Was it
21 a call out of the blue?

22 A Yes.

23 Q You'd never met Cary Case or Alex Stehl before?

24 A No, I had not.

25 Q Had you been to the Metropolitan before?

1 A Not before this specific instance, no.

2 Q And so walk me through what you were requested to do at
3 the Metropolitan by Mr. Stehl and/or Mr. Case.

4 A I was requested to go in and do a visual inspection to
5 determine impact to the structure by the previous fire.

6 Q Okay. And in this email, it looks like there's some
7 specific directions as to where they want you to sample; is
8 that fair?

9 A Yes, that is correct.

10 Q Okay. So is this a representation of what you -- the
11 limited amount of information you had before you went out
12 there?

13 A Yes.

14 Q Okay. And so with respect to the timing of this, was
15 there any -- I see in that -- the first paragraph, We would
16 like to set a limit not to exceed \$6,500 and have findings to
17 us by Friday, April 19th, 2019.

18 Do you remember that?

19 A Yes, sir, I do.

20 Q So there was a request that you have a report to them by
21 Friday, April 19th, 2019, correct?

22 A Yes.

23 Q At the time, did you understand where the fire had been?
24 And what I mean by that is it was a fire external to these
25 other spaces or internal?

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1 A External to the spaces in -- referenced in the email.

2 Q Okay. And so prior to this particular job, had you had
3 experience on fire sites before?

4 A I have.

5 Q Tell me in what context.

6 A Most of what my experience was based on --

7 MR. ABRAMS: May we approach?

8 (Counsel approached the bench and the following
9 proceedings were had:)

10 MR. ABRAMS: Your Honor, this is a fact witness.
11 This is not an expert. I think it's fine to get into
12 qualifications, but for him to -- he can't render -- he can
13 talk about what he did and what the results were, but he
14 shouldn't be rendering any opinions beyond that. So he's --

15 MR. ELY: That's okay. That's fair. I'm not trying
16 to render some opinion that's not been disclosed here. I'm
17 just -- I want his observations of the facility when he went
18 out there, and that's what I'm kind of driving at because he
19 has some experience in that.

20 MR. ABRAMS: Just to be clear, when you say he is
21 not disclosed, he's not an expert.

22 MR. ELY: No, he's not an expert. Not offering for
23 the purpose of --

24 THE COURT: You're asking about his observations, is
25 that what you said?

1 MR. ELY: Yes, sir. What I'm trying to establish
2 that he's been on a fire site.

3 THE COURT: What else are you trying to establish?

4 MR. ELY: I'm trying to establish that he did the
5 inspections and he did the sampling and what the conditions in
6 the property were and what his communications with Maxus were
7 about the results and when he was terminated.

8 MR. ABRAMS: Your Honor, that's totally fair game.

9 MR. ELY: I'll try to stay in that narrow area.

10 (The proceedings returned to open court.)

11 Q (BY MR. ELY) Back to my question, Mr. Stiles. You had
12 been on fire sites before?

13 A I have.

14 Q Tell me in what context.

15 A Mostly asbestos inspections due to renovation or
16 demolition regulations.

17 Q Okay. So when you got to the Metropolitan -- this is an
18 April 9th email. Do you recall when you arrived at the
19 Metropolitan to start sampling?

20 A It was a day or two later. I don't remember -- or
21 excuse me. It was the week before that obviously. I believe
22 it was the 15th and the 16th.

23 Q Okay.

24 MR. ELY: Let's back up a little. Go to the first
25 page, please.

1 Q (BY MR. ELY) So take a look down at the bottom there.

2 Does this refresh your recollection, Mr. Stiles?

3 A Yes. It appears we began work on April 11th.

4 Q Okay. And so when you went out to take your samples,
5 where did you start?

6 A We started in what is referred to as the doughnut
7 building, and we were directed into apartments located on the
8 east side of that building closest to where the fire was.

9 Q Okay. And do you know how long you all spent out there
10 conducting sampling?

11 A Approximately two days.

12 Q Okay. So when you arrived at the site, what were your
13 observations of the doughnut -- the condition of the doughnut
14 building?

15 A The doughnut building appeared to be very clean.

16 Q Okay. And when you -- before you arrived, what did you
17 expect to see based on your -- based on what had been related
18 to you about what you were investigating?

19 A No one really told me the conditions; so I didn't really
20 have much of an expectation. But when I arrived, I
21 immediately expected those units that I was inspecting to be
22 occupied soon.

23 Q Okay.

24 A Based on their condition -- based on my visual
25 observation.

1 Q Okay. Were you able to observe any physical signs of
2 smoke damage, soot deposition, anything of that nature?

3 A Not in the doughnut building at all, no.

4 Q Did you -- was there any smell that you were -- could
5 tell from the --

6 A I do not recall any odors or visual evidence of soot or
7 fire particles.

8 Q Okay. And walk me through, if you would, just please
9 your inspections of the individual units when you were -- and
10 I suspect you were looking around the units and taking the
11 samples in the units?

12 A Correct. So the initial visual inspection would be of
13 the entire apartment. Typically when I do an inspection, I do
14 it the same way every time so that I can keep up with my own
15 pace and location within the structure. So I would start in a
16 clockwise fashion and work my way around from room to room.

17 So in these specific apartments, there were
18 kitchens, bedrooms, bathrooms, and what is -- you know, could
19 be referred to as a utility closet that contained the water
20 heater and the HVAC system.

21 Q Were there particular areas that you were targeting for
22 sampling in the apartment -- in individual apartments?

23 A Really it was just based on the visual inspection. You
24 know, the standard for inspection says look for fire and soot
25 particles or things that could resemble fire and soot

1 particles. So those were the intended targets of our
2 sampling. We never actually found anything that looked like
3 that.

4 Q Okay. So not finding any targets, did you -- were there
5 any areas that you decided to target secondarily?

6 A Typically, that would be, you know, surfaces that may or
7 may not have been cleaned before we were there.

8 Q Okay. So you sampled in the doughnut building on day
9 one; and day two, you worked around to the other areas of
10 phase 4 and then into phase 5. And those were in a different
11 condition, were they not?

12 A Yes, they were unfinished.

13 Q Okay. And you observed phase 5 on April -- was it April
14 12th, I guess? If you started on April 11th, it would be
15 April 12th?

16 A Yes. It would have been the 12th, yes.

17 Q What were your observations of the condition of the
18 phase 5 building at that time?

19 A Considering that it was an active construction site, it
20 was fairly clean. There was obviously evidence of some water
21 intrusion issues and things like that. Again, no real
22 evidence that I could see of fire or soot particle deposition
23 on the surfaces.

24 Q Okay. So how many samples did you collect at the
25 Metropolitan that day?

1 A I believe it was --

2 Q Those two days, I'm sorry.

3 A I believe it was 97 combined.

4 Q Now, and these were all tape lift samples, correct?

5 A Yes, that's correct.

6 Q And so you sample on the 11th and the 12th, and then I'm
7 assuming took the samples back to your laboratory?

8 A That is correct.

9 Q And what -- tell us what you -- how you had the samples
10 analyzed.

11 A So SELC operates an accredited PLM lab for asbestos, and
12 the microscope used for asbestos analysis can be the same
13 microscope that is typically used for fire and soot particle
14 analysis.

15 So once I filled out the chain of custody form,
16 turned those samples in, our PLM analyst began the analysis in
17 house.

18 Q Who was that person?

19 A His name is Talieson Partridge.

20 Q Okay. And had Mr. Partridge, did he have experience
21 reviewing combustion byproducts through a PLM analysis?

22 A Yes.

23 Q And was this -- was this the first -- was this the first
24 combustion byproduct sampling that you all had done at SELC?

25 A In-house, correct, yes.
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1 Q Okay. You had done it before?

2 A Yes.

3 Q But the microscopic analysis, you just weren't doing
4 that analysis in house?

5 A Correct. We were typically sending that to a
6 third-party laboratory.

7 Q Such as?

8 A EMSL is probably the most recognizable.

9 Q Okay. So in this instance, you had Mr. Talieson?

10 A Yes. Just call him Tal, T-a-l.

11 Q You had Tal. You were going to leave this in-house and
12 let Tal do the microscopy on it?

13 A Correct.

14 Q So you bring the 97 samples back to your office in
15 Pelham. Tell me what happens next.

16 A So once Tal started the analysis, he was kind of keeping
17 me up to date in realtime. You know, we were kind of
18 organizing our response back to our client so that, you know,
19 we could meet the April 19th deadline.

20 Q Okay. So were you getting -- let me back up.

21 After you take the samples, return to your lab at
22 Pelham, and start the analysis on -- I guess it's Monday, the
23 15th probably?

24 A That's correct.

25 Q Did you have any communications with Mr. Stehl or
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1 Mr. Case about what you were doing early in the week of the
2 15th?

3 A I don't believe it was on Monday. I believe on Tuesday
4 I made a phone call and kind of gave them a verbal of the
5 results.

6 Q Had Tal been through all of the results -- all -- sorry.
7 All of the tape samples at least preliminarily when you made
8 that call?

9 A Yes.

10 Q And in that call, what did -- what did you tell Maxus or
11 Alex Stehl?

12 A We really didn't find anything.

13 Q Okay. And what was Alex's response to you?

14 A Okay. Stop what you're doing and don't publish the
15 report.

16 Q Did he give you any reason why?

17 A No, he did not.

18 Q And his termination of your services was in that very
19 phone call --

20 A Yes.

21 Q -- when you related the results?

22 A Yes, it was.

23 Q Okay.

24 MR. ELY: Nothing further, Mr. Stiles.

25 CROSS-EXAMINATION BY MR. ABRAMS:
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1 Q Mr. Stiles, good morning.

2 A Yes, sir.

3 Q My name is Mike Abrams.

4 Just a few questions for you. When you went to the
5 Metropolitan to do the sampling, HVAC was working in 1 through
6 3?

7 A It was in the doughnut building.

8 Q That's -- 1 through 3 is --

9 A That's 1 through 3? Then, yes, yes. The apartments
10 that I looked at, everything seemed to be normal.

11 Q And I'm correct, you didn't test behind walls, correct?

12 A Did not remove any finishing materials to do tests, no,
13 I did not.

14 Q And you said that you also the next -- that day or the
15 next day, April 12th, 2019, you did some sampling at phase 5
16 that was not finished, correct?

17 A It was actually 4 and 5.

18 Q 4 and 5, right.

19 A Yes, sir.

20 Q Right. And focusing on 5, you said you saw some water
21 intrusion, correct?

22 A I believe so, yes. The day that I was there, the day
23 before, there was a sprinkler head burst.

24 Q Yeah. But it wasn't like floods of water?

25 A Only in one location.
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1 Q Okay. Just -- and it was in the process of being
2 cleaned?

3 A Correct. There was actually subfloor removed and areas
4 that were not accessible in that hallway because of that.

5 Q The subfloors had already been removed?

6 A Correct.

7 Q Okay. Am I correct that you said that for SELC this was
8 the first time that your lab was assigned to test for
9 combustion byproducts?

10 A To analyze the samples, correct.

11 Q Okay.

12 MR. ABRAMS: Nothing else. Thank you, Mr. Stiles.

13 THE WITNESS: Yes, sir.

14 MR. ELY: Briefly, Your Honor.

15 REDIRECT EXAMINATION BY MR. ELY:

16 Q In terms of the locations, Mr. Stiles, that you looked
17 at in the individual apartments, those individual apartments
18 had individual HVAC units in them, correct?

19 A Yes, sir, that's correct.

20 Q Did you sample in the HVAC units?

21 A Yes, sir, I did.

22 Q Did you do that on every apartment?

23 A I believe so, yes.

24 MR. ELY: Nothing further.

25 RECROSS-EXAMINATION BY MR. ABRAMS:

1 Q Mr. Stiles, just to be clear though, even though you
2 sampled the HVAC, you didn't sample behind walls, correct?

3 A That is correct.

4 Q All right. And, Mr. Stiles, is there anything wrong
5 with a client not wanting there to be two people who are
6 investigating, sampling, and perhaps going with an outfit that
7 had more experience in terms of sampling combustion
8 byproducts?

9 A I would say no.

10 MR. ABRAMS: Thank you, sir.

11 MR. ELY: Nothing further, Your Honor.

12 THE COURT: Thank you.

13 THE WITNESS: Yes, sir. Thank you.

14 MR. ELY: Your Honor, may we approach?

15 (Counsel approached the bench and the following
16 proceedings were had:)

17 MR. ELY: We are at a break point. I have one
18 witness who is on her way. Mike has additional witnesses
19 coming, I understand, in rebuttal. You have a witness you're
20 trying to take out of time?

21 MR. ABRAMS: Yeah, but we may not. Given what we
22 have, we may not use him. So we have three rebuttal
23 witnesses. That's all that's left.

24 THE COURT: You're saying you have a witness that's
25 on a plane? What do I take that to mean?

1 MR. ELY: He's not here, Your Honor.

2 THE COURT: When will he be here?

3 MR. ELY: He'll be here in the morning.

4 THE COURT: We don't have another witness today?

5 MR. ELY: Not today, Your Honor. I anticipated that
6 we would -- as I mentioned, we would finish with our evidence
7 on Wednesday morning, and this has just gone faster than we
8 expected.

9 THE COURT: Who do you have for me today?

10 MR. ABRAMS: Well, we have our three witnesses, but
11 they were scheduled to go tomorrow. They'll all be ready. I
12 don't -- I think they're coming in tonight because they --
13 they're gone -- they're going tomorrow.

14 THE COURT: How did we get in this mess? You know,
15 I don't care, but the jury, they have to be frustrated with
16 all this.

17 So I'm going to -- I fully expected to be submitting
18 this case on Thursday.

19 MR. ELY: We will be, Your Honor.

20 MR. ABRAMS: I mean, how long do you think you need
21 with -- you have Mulder tomorrow?

22 MR. ELY: Yes, sir.

23 MR. ABRAMS: How long do you think you need? Can we
24 talk this over? How long do you think you need with Mulder?

25 THE COURT: Let's do this. You're going to talk.
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1 Should we let the jury go?

2 MR. ABRAMS: Let the jury go.

3 (The proceedings returned to open court.)

4 THE COURT: We're at a position in this trial where
5 we have witnesses who are not here yet. I'm going to let you
6 go for the rest of the day. I need to talk to the attorneys
7 about things.

8 It is my expectation that we will be submitting this
9 case to you on Thursday morning, and so that's still within
10 the timeframe that I had -- I think I represented to you early
11 on.

12 So we're -- this happens in trials all the time, and
13 it's better that we spend some time discussing some things so
14 that we can get moving smoother. I hope you will accept my
15 apology for bringing you down here for half a day; but in the
16 long run, the case is going to move smoother.

17 So have a good afternoon. Thank you.

18 Remember my instruction, my admonitions, please.

19 (The following proceedings were had out of the
20 presence of the jury:)

21 THE COURT: Anything?

22 MR. ABRAMS: Your Honor, my understanding is that
23 defense has one witness left. We have three rebuttal
24 witnesses because we're going to make a decision not to use --

25 THE COURT: You have one witness. How much time do
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1 you think that witness will take?

2 MR. ELY: An hour in the morning.

3 THE COURT: And your rebuttal?

4 MR. ABRAMS: Three rebuttal. We'll try to make them
5 as short as possible and get done by Wednesday. I think that
6 that's definitely doable.

7 THE COURT: I'm asking for more specific. So if
8 you've got an hour, how long are you going to take?

9 MR. ABRAMS: Oh, on cross?

10 THE COURT: That too, but how long will your three
11 take?

12 MR. ABRAMS: I think the first two, we think with --

13 MS. McMULLIN: I think less than an hour.

14 MR. ABRAMS: The last one, Mr. Baxter, may go a
15 little longer. He may be an hour, hour and a half.

16 THE COURT: So we're talking little over morning
17 with the testimony, correct?

18 MR. ABRAMS: Correct.

19 MR. ELY: Well --

20 MR. ABRAMS: Definitely into the afternoon, Your
21 Honor.

22 THE COURT: From what you're telling me, I'm
23 thinking one o'clock, two o'clock because we need to spend
24 some time talking about instructions too. That sound like a
25 fair representation of what tomorrow will look like?

1 MR. ELY: I anticipate -- your Honor, with regard to
2 their two expert witnesses, they're not going to be long on
3 direct, and they're certainly not going to be long on cross.
4 Mr. Baxter may take a little bit longer. So I would think
5 maybe if it takes Mike an hour to an hour and a half on
6 direct, probably 45 minutes or an hour on cross.

7 Mr. Mulder on my end will probably take an hour on
8 direct. So I can't speak to the cross, but that's kind of the
9 math that I'm doing.

10 THE COURT: Tomorrow I'll probably be letting the
11 jury go around two or three. That sound right?

12 MR. ABRAMS: Yes.

13 MR. ELY: That sounds right.

14 MR. ABRAMS: And talk about instructions in the
15 afternoon and then argue Thursday morning?

16 THE COURT: Yes. That sound right?

17 MR. ELY: Yes, Your Honor.

18 MR. ABRAMS: Yes.

19 THE COURT: I want it in blood.

20 MR. ELY: All right. Thank you.

21 Do we have the Zoom set in the morning?

22 Rule 50 motion, can we do that in the morning?

23 THE COURT: Yes.

24 MR. ELY: Great. Thank you.

25 THE COURT: Anything else, gentlemen? Otherwise,
951

1 I'm out. Is there going to be any reading of deposition
2 testimony? You don't intend to read any deposition testimony?

3 MR. ABRAMS: Oh, we don't.

4 MR. ELY: Yeah. I think we have one. I don't know
5 for sure. I forgot. That will take no longer than 30
6 minutes.

7 THE COURT: You have your allotted time. You've got
8 to squeeze it into that.

9 MR. ELY: Yes, sir.

10 (Court adjourned.)

11 REPORTER'S CERTIFICATE

12

13 I certify that the foregoing pages are a correct
14 transcript from the record of proceedings in the
15 above-entitled matter.

16

17

Date	/s/Gayle M. Wambolt GAYLE M. WAMBOLT, CRR, RMR United States Court Reporter
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